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1354
United States
1354
Circuit Court of Appeals

For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Plaintiff in Error,

vs.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Northern Division.

FILED
JUL 25 1923
F. D. MONGKTON,
CLERIC

United States
Circuit Court of Appeals
For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

Messrs. BOGLE, MERRITT & BOGLE, Attorneys
for Plaintiff in Error,

609-16 Central Building, Seattle, Washington.

E. I. JONES, Esq., Attorney for Plaintiff in Error,
609-16 Central Building, Seattle, Washing-
ton.

FRED C. BROWN, Esq., Attorney for Defendant
in Error,

201 Lyon Building, Seattle, Washington.

J. STANLEY TYRRELL, Esq., Attorney for De-
fendant in Error,

203 Lyon Building, Seattle, Washington.

[1*]

COPY.

In the Superior Court of the State of Washington
for King County.

7018.

No. 160,595.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That plaintiff and Anna J. Roman, during the times hereinafter mentioned, were and now are husband and wife; that plaintiff brings this action for and on behalf of himself and the community composed of himself and Anna J. Roman, his wife.

II.

That there has been *bron* as the issue of said marriage seven children, the oldest being a girl fourteen years of age, and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

III.

That deceased had no wife and children, and plaintiff and said Anna J. Roman, his parents, have been and now are residents of Seattle, King County, Washington, and for some time prior to and after the death of said Edgar Roman, deceased, plaintiff was dependent upon him for support.

IV.

That plaintiff for a number of years last past has been and now is physically incapacitated for labor and unable to support his said wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased, has contributed materially to plaintiff and his family for the necessities [2] of life and was at the time

of his death contributing to the support of the plaintiff and would have materially continued to support plaintiff during the rest of his natural life.

V.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12, which extends from Argo Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

VI.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South in a northerly direction and crossing said track No. 12 at a point approximately described as follows: Beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly

direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously and notoriously used by the public as a right of way across and over said track No. 12 without objection on the part of the railroad company for more than twenty years last past. That a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at [3] or near said path, nor was there, on the date hereinafter mentioned any sign notifying children, or the child of this plaintiff, to not go upon or across said track No. 12 at its intersection with said path.

VII.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VIII.

That at about 4:00 o'clock P. M. on said day the plaintiff's children, Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing

said track plaintiff's children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that the said injuries were compound comminuted fractures; that by reason of said negligent and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died. [4]

IX.

That by reason of the death of said Edgar Roman, plaintiff has been deprived of his support for the rest of his natural life, and has been damaged in the sum of Fifteen Thousand Dollars.

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, together with his costs herein.

FRED C. BROWN,

J. STANLEY TYRRELL,

Attorneys for Plaintiff.

201 Lyon Building,

Seattle, Washington. [5]

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says: That he is the plaintiff above named; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

JAMES E. ROMAN.

Subscribed and sworn to before me this 14th day of July, 1922:

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in County Clerk's Office, King County, Wash. Aug. 8, 1922. George A. Grant, Clerk. By R. W. Flemming, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 29, 1922. F. M. Harshberger, Clerk. [6]

COPY.

In the Superior Court of the State of Washington
in and for King County.

7019.

No. 160,596.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

**OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY**, a Corporation,
Defendant.

Complaint.

Comes now the plaintiff and for cause of action
alleges:

I.

That on the 10th day of July, 1922, this plaintiff
was duly and regularly appointed administrators
of the estate of Edgar Roman, deceased, and has
qualified as such; that the heirs at law of said
Edgar Roman are the plaintiff above named and
Annie J. Roman. That he brings this action for
and on behalf of said heirs.

II.

That plaintiff and Anna J. Roman during the
times hereinafter mentioned were and now are hus-
band and wife; that there has been born as the issue
of said marriage seven children, the oldest being a
girl fourteen years of age, and one of said children

was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

III.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12, which extends from Argo [7] Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

IV.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said track No. 12 at a point approximately described as follows: Beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said

track has been continuously and notoriously used by the public as a right of way over and across said track No. 12, without objection on the part of the railroad company for more than twenty years last past. That a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near the path, nor was there, on the date hereinafter mentioned, any sign notifying children, or the child of this plaintiff, to not go upon or across said track No. 12 at its intersection with said path.

V.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VI.

That at about 4:00 o'clock P. M. on the said day, the plaintiff's children Edgar and Charles, at the intersection of said [8] path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing said track plaintiff's

children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that said injuries were compound comminuted fractures; that by reason of said negligent and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VII.

That by reason of said pain and suffering of said Edgar Roman, deceased, from May 18th, 1922, to May 22, 1922, plaintiff has been damaged in the sum of Fifteen Thousand Dollars.

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, and for all his costs herein.

FRED C. BROWN,

J. STANLEY TYRRELL,

Attorneys for Plaintiff.

201 Lyon Building,

Seattle, Washington. [9]

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says: That he is the administrator of the estate of Edgar Roman, deceased, and plaintiff above named; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

JAMES E. ROMAN.

Subscribed and sworn to before me this 14 day of July, 1922.

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in County Clerk's Office, King County, Wash. Aug. 8, 1922. George A. Grant, Clerk. By R. W. Flemming, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 29, 1922. F. M. Harshberger, Clerk.

[10]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Demurrer.

Comes now the defendant in the above-entitled action, and demurs to the complaint filed herein on the ground that it appears upon the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

BOGLE, MERRITT & BOGLE,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 16, 1922. F. M. Harshberger, Clerk. [11]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Demurrer.

Comes now the defendant in the above-entitled
action, and demurs to the complaint filed herein on
the ground that it appears upon the face of said
complaint that the same does not state facts suf-
ficient to constitute a cause of action.

BOGLE, MERRITT & BOGLE,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Sep. 16, 1922. F. M. Harshberger,
Clerk. [12]

United States District Court, Western District of
Washington, Northern Division.

No. 7018.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON R. R. & N. CO.,

Defendant.

Hearing on Demurrer.

Now, on this 16th day of October, 1922, this cause comes on for hearing on demurrer, which is argued by respective counsel and same is overruled.

Journal #10, page 321. [13]

United States District Court, Western District of
Washington, Northern Division.

No. 7019.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON R. R. & N. CO.,

Defendant.

Hearing on Demurrer.

Now, on this 16th day of October, 1922, this cause comes on for hearing on demurrer, which is argued by respective counsel and same is overruled.

Journal #10, page 321. [14]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant herein, Oregon-Wash-
ington Railroad & Navigation Company, a corpora-
tion, and for its answer to the complaint herein,
admits, denies and alleges as follows, to wit:

I.

It admits the allegations of paragraphs I, II and
V thereof.

II.

Answering the allegations of paragraph III
thereof, it admits that deceased had no wife and
children, and that plaintiff and said Anna J. Roman
are residents of Seattle, King County, Washington.
Except as herein expressly admitted, defendant
denies each and every allegation, matter and thing
contained in said paragraph.

III.

It denies any knowledge or information thereof
sufficient to form a belief as to any allegation, mat-

ter, statement of thing contained in paragraph IV thereof, and it therefore denies the same. [15]

IV.

Answering the allegations of paragraph VI thereof, it denies each and every allegation, matter and thing therein contained.

V.

Answering the allegations of paragraph VII thereof, defendant admits that on the afternoon of the 18th day of May, 1922, there were standing on said track No. 12 a number of cars. Except as herein expressly admitted, defendant denies each and every allegation, matter and thing contained in said paragraph.

VI.

Answering the allegations of paragraph VIII thereof, defendant denies each and every allegation, matter and thing therein contained.

VII.

Answering the allegations of paragraph IX thereof, defendant denies each and every allegation, matter and thing therein contained, and especially denies that plaintiff has been damaged in the sum of \$15,000, or in any sum whatsoever, by reason of any negligence on the part of the defendant, or at all.

FURTHER ANSWERING said complaint and as an affirmative defense to the alleged cause of action therein contained, defendant alleges:

That the place mentioned and referred to in said complaint as the place where the said Edgar Roman suffered said alleged injuries, is not a crossing,

public or otherwise, neither has any right of way to the public or to the said Edgar Roman [16] ever been acquired over or upon said track No. 12 in any manner whatsoever; that said Edgar Roman at the time and place mentioned and referred to in said complaint, was a trespasser upon the said track No. 12, which was situated in the switch-yard of the defendant in the city of Seattle; that if said Edgar Roman was injured, as alleged in said complaint, such injuries, and all thereof, were wholly caused by his negligence in crossing or attempting to cross said track No. 12, and by the negligence of the plaintiff herein and his wife, who then and there had said Edgar Roman in charge, in permitting and directing him to cross said track No. 12, and that the negligence of said Edgar Roman and the said plaintiff and his wife, was the sole and proximate cause of said injuries.

WHEREFORE, defendant demands judgment that plaintiff take nothing in his complaint, and that defendant be hence dismissed with its costs and disbursements herein.

BOGLE, MERRITT & BOGLE,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

W. H. Bogle, being first duly sworn, on oath, says: That he is the agent and attorney for the Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled action; that he is authorized to make this verification in its behalf; that he has read the foregoing Answer,

Answer.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and for its answer to the complaint herein, admits, denies and alleges as follows, to wit:

I.

It denies any knowledge or information thereof sufficient to form a belief as to any allegation, matter or thing contained in paragraph I thereof, and therefore denies the same.

II.

It admits the allegations of paragraph II and III thereof.

III.

It denies each and every allegation, matter and thing contained in paragraph IV thereof.

IV.

Answering the allegations of paragraph V thereof, it admits that on the afternoon of the 18th day of May, 1922, there were standing on said track No. 12 a number of railway cars. Except [19] as herein expressly admitted, defendant denies each and every allegation, matter and thing contained in said paragraph.

V.

It denies each and every allegation, matter and thing contained in paragraph VI thereof.

VI.

Answering the allegations of paragraph VII

thereof, defendant denies each and every allegation, matter and thing therein contained, and especially denies that the plaintiff has been damaged in the sum of \$15,000, or in any sum whatsoever, by reason of any negligence on the part of the defendant herein, or at all.

FURTHER ANSWERING said complaint and as an affirmative defense to the alleged cause of action therein contained, defendant alleges:

That the place mentioned and referred to in said complaint as the place where the said Edgar Roman suffered said alleged injuries is not a crossing, public or otherwise, neither has any right of way to the public or to the said Edgar Roman ever been acquired over or upon said track No. 12 in any manner whatsoever; that said Edgar Roman at the time and place mentioned and referred to in said complaint was a trespasser upon the said track No. 12, which was situated in the switch yard of the defendant in the city of Seattle; that if said Edgar Roman was injured, as alleged in said complaint, such injuries, and all thereof, were wholly caused by his negligence in crossing or attempting to cross said track No. 12, and by the negligence of the plaintiff herein and his wife, who then and there had said Edgar Roman in charge, in permitting and directing him to cross said track No. 12, and that the negligence of said Edgar Roman and the said plaintiff and his wife, was the sole and proximate cause of said injuries.

WHEREFORE, defendant demands judgment that plaintiff take [20] nothing in his complaint,

and that defendant be hence dismissed with its costs and disbursements herein.

BOGLE, MERRITT & BOGLE.

State of Washington,
County of King,—ss.

W. H. Bogle, being first duly sworn, on oath, says: that he is the agent and attorney for the Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled action, and is authorized to make this verification in its behalf; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 23d day of October, 1922.

[Notarial Seal] E. I. JONES,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 17, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Reply.

Comes now the above-named plaintiff and replies to the affirmative defense contained in defendant's answer as follows:

I.

That he denies said affirmative defense and each and every allegation therein contained.

WHEREFORE having fully replied to said answer, this plaintiff prays for the same relief as demanded in the complaint.

J. STANLEY TYRRELL and
FRED C. BROWN,

Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath, deposes and says, that he is the plaintiff in the above-entitled action; that he has read the forego-

ing reply, knows the contents thereof, and believes the same to be true.

JAMES ROMAN.

Subscribed to and sworn to before me this 30 day of October, 1922.

FRED C. BROWN,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within reply recd. this 1st day of Nov., 1922.

BOGLE, MERRITT & BOGLE,

Attorney for Dft. [22]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Reply.

Comes now the above-named plaintiff and replies to the affirmative defense contained in defendant's answer as follows:

I.

That he denies said affirmative defense and each and every allegation therein contained.

WHEREFORE having fully replied to said answer, this plaintiff prays for the same relief as demanded in the complaint.

**FRED C. BROWN and
J. STANLEY TYRRELL,**
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

JAMES ROMAN.

Subscribed and sworn to before me this 30th day of October, 1922.

Notary Public in and for the State of Washington, Residing at Seattle. [24]

Copy of within reply recd. this 1st day of Nov., 1922.

BOGLE, MERRITT & BOGLE,
Attorneys for Deft.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the Superior Court of the State of Washington
in and for King County.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corpora-
tion,

Defendant.

Amended Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That on the 10th day of July, 1922, this plaintiff was duly and regularly appointed administrator of the estate of Edgar Roman, deceased, and has qualified as such; that the heir at law of the said Edgar Roman is the plaintiff above named and Anna J. Roman; that he brings this action for and on behalf of said heirs.

II.

That plaintiff and Anna J. Roman during the times hereinafter mentioned were and now are husband and wife; that there has been born as the issue of said marriage seven children, the eldest being a girl of fourteen years of age, and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

III.

That plaintiff for a number of years last past has been and now is physically incapacitated for labor and unable to support his wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased, has contributed materially to said plaintiff for the necessities of life and was at the time of his death contributing to the support of plaintiff and would have materially continued to support plaintiff during the rest of his natural life. [26]

IV.

That the Oregon-Washington Railroad and Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12 which extends from Argo Station in a westerly direction some three thousand feet; that

said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

V.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said tract No. 12 at a point approximately described as follows: beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously and notoriously used by the public as a right of way over and across said track No. 12, without objection on the part of the railroad company for more than twenty years last past; that a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near said path, nor was there, on the date hereinafter mentioned, any sign, notifying children, or the child of this plaintiff to not go upon or across said track No. 12 at its intersection with said path. [27]

VI.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and

commencing about four feet east of said path and extending eastward about 2800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VII.

That at about 4:00 o'clock P. M. on the said day, the plaintiff's children Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing said track plaintiff's children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that said injuries were compound comminuted fractures; that by reason of said negligent and careless acts of the defendant

corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VIII.

That by reason of said pain and suffering of said Edgar Roman, deceased, from May 18th, 1922, to May 22, 1922, plaintiff has been damaged in the sum of Fifteen Thousand Dollars. [28]

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, and for all his costs herein.

FRED C. BROWN,

STANLEY J. TYRELL,

Attorneys for Plaintiff.

201 Lyon Building,
Seattle, Washington.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is the administrator of the estate of Edgar Roman, deceased, and plaintiff above named; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

JAMES E. ROMAN.

Subscribed and sworn to before me this 14th day of December, 1922.

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 15, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

In the Superior Court of the State of Washington
in and for King County.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
tion,

Defendant.

Amended Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That plaintiffs above named during the times hereinafter mentioned were and now are husband and wife; that there has been born as the issue of said marriage seven children, the eldest being a

girl fourteen years of age and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

II.

That deceased had no wife and children and plaintiffs, his parents, during the times hereinafter mentioned were and now are residents of the United States of America, residing at Seattle, King County, Washington, and for some time prior to and after the death of said Edgar Roman, deceased, plaintiffs were dependent upon him for support.

III.

That James Roman as aforesaid for a number of years last past has been and now is physically incapacitated for labor and unable to support his wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased, has contributed materially to said plaintiffs for the necessities of life and was at the time of his death contributing to the support of plaintiffs and would have materially continued to support plaintiffs [30] during the rest of their natural lives.

IV.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, run-

ning in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12 which extends from Argo Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

V.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said track No. 12 at a point approximately described as follows: beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a north westerly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously and notoriously used by the public as a right of way over and across said track No. 12 without objection on the part of the railroad company for more than twenty years last past; that a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near said path, nor was there, on the date hereinafter mentioned, any sign, notifying children, or the

child of this plaintiff to not go upon or across said track No. 12 at its intersection with said path.
[31]

VI.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VII.

That at about 4:00 o'clock P. M. on the said day, the plaintiffs' children, Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing said track plaintiffs' children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward

and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that said injuries were compound comminuted fractures; that by reason of said negligence and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VIII.

That by reason of said pain and suffering of said Edgar Roman, deceased, from May 18th, 1922, to May 22, 1922, plaintiff has been damaged in the sum of Fifteen Thousand Dollars. [32]

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, and for all his costs herein.

FRED C. BROWN,
STANLEY TYRRELL,
Attorneys for Plaintiff.

201 Lyon Building,
Seattle, Washington.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is one of the plaintiffs in the above-entitled action, that he has read the fore-

going amended complaint, knows the contents thereof, and believes the same to be true.

JAMES E. ROMAN.

Subscribed and sworn to before me this 14th day of December, 1922.

FRED C. BROWN,

Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 15, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [33]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Second Amended Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That plaintiffs above named during the times hereinafter mentioned were and now are husband and wife; that there has been born as the issue of said marriage seven children, the eldest being a girl fourteen years of age and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

II.

That deceased had no wife and children and plaintiffs, his parents, during the times hereinafter mentioned were and now are residents of the United States of America, residing at Seattle, King County, Washington, and for some time prior to and after the death of said Edgar Roman, deceased, plaintiffs were dependent upon him for support.

III.

That James Roman as aforesaid for a number of years last past has been and now is physically incapacitated for labor and unable to support his wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased, has contributed materially to said plaintiffs for the necessities of life and was at the time of his death contributing to the support of plaintiffs and would have materially continued to support plaintiffs [34] during the rest of their natural lives.

IV.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under

the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12 which extends from Argo Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

V.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said track No. 12 at a point approximately described as follows: beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously and notoriously used by the public as a right of way over and across said track No. 12 without objection on the part of the railroad company for more than twenty years last past; that a great number of adults and

children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near said path, nor was there, on the date hereinafter mentioned any sign, notifying children, or the child of this plaintiff to not go upon or across said track No. 12 at its intersection with said path. [35]

VI.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VII.

That at about 4:00 o'clock P. M. on the said day, the plaintiffs' children, Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing said tract plaintiffs' children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while

crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that by reason of said negligent and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VIII.

That by reason of the death of said Edgar Roman, plaintiff has been deprived of his support for the rest of his natural life, and has been damaged in the sum of Fifteen Thousand Dollars (\$15,000.00). [36]

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, and for all his costs herein.

FRED C. BROWN,
J. STANLEY TYRRELL,
Attorneys for Plaintiff.

201 Lyon Bldg.,
Seattle, Wash.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is one of the plaintiffs above named; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

JAMES ROMAN.

Subscribed and sworn to before me this 5th day of January, 1923.

FRED C. BROWN,
Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 16, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [37]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corpora-
tion,

Defendant.

Second Amended Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That on the 10th day of July, 1922, this plaintiff was duly and regularly appointed administrator of the estate of Edgar Roman, deceased and has qualified as subject; that the heir at law of the said Edgar Roman is the plaintiff above named and Anna J. Roman; that he brings this action for and on behalf of said heirs.

II.

That plaintiff and Anna J. Roman during the times hereinafter mentioned were and now are husband and wife and are residents of the United States of America, residing at Seattle, King County, Washington; that there has been born as the issue of said marriage seven children, the eldest being a girl of fourteen years of age, and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

III.

That plaintiff for a number of years past has been and now is physically incapacitated for labor and unable to support his wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased has contributed materially to said plaintiff for the necessities of life and was at the time of his death contributing to the support of plaintiff and would

have materially continued to support plaintiff during the rest of his natural life. [38]

IV.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12 which from Argo Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

V.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said track No. 12 at a point approximately described as follows: beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously

and notoriously used by the public as a right of way over and across said track No. 12, without objection on the part of the railroad company for more than twenty years last past; that a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near said path, nor was there, on the date hereinafter mentioned, any sign, notifying children, or the child of this plaintiff to not go upon or across said track No. 12 at its intersection with said path. [39]

VI.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VII.

That at about 4:00 o'clock P. M. on the said day, the plaintiff's children, Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved;

that before crossing said track plaintiff's children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that said injuries were compound comminuted fractures; that by reason of said negligent and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VIII.

That by reason of said pain and suffering of said Edgar Roman, deceased, from May 18th, 1922, to May 22, 1922, plaintiff has been damaged in the sum of Fifteen Thousand Dollars (\$15,000.00).
[40]

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen

Thousand Dollars (\$15,000.00) and for all his costs herein.

FRED C. BROWN,
J. STANLEY TYRRELL,
Attorneys for Plaintiff.

201 Lyon Bldg.
Seattle, Wash.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is the administrator of the estate of Edgar Roman, deceased, and plaintiff above named; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

JAMES ROMAN.

Subscribed and sworn to before me this 5th day of January, 1922.

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 16, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [41]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Answer to Second Amended Complaint.

Comes now the defendant herein, Oregon-Wash-
ington Railroad & Navigation Company, a corpora-
tion, and for its answer to the second amended com-
plaint herein, admits, denies and alleges as follows,
to wit:

I.

It admits the allegations of paragraphs I and
IV thereof.

II.

Answering the allegations of paragraph II there-
of, it admits that the deceased had no wife and
children and that his parents during all the times
hereinafter mentioned were and now are residents
of the United States of America, residing at Seattle,
Washington. Except as herein expressly admitted,
defendant denies each and every allegation, matter
and thing contained in said paragraph.

III.

It denies any knowledge or information sufficient to form a belief as to any allegation, matter, statement or thing contained in paragraph III thereof, and it therefore denies the same. [42]

IV.

Answering the allegations of paragraph V thereof, it denies each and every allegation, matter and thing therein contained.

V.

Answering the allegations of paragraph VI thereof, defendant admits that on the afternoon of the 18th day of May, 1922, there was standing on said Track No. 12 a number of cars. Except as herein expressly admitted, defendant denies each and every allegation, matter and thing contained in said paragraph.

VI.

Answering the allegations of paragraph VII thereof, defendant denies each and every allegation, matter and thing therein contained.

VII.

Answering the allegation of paragraph VIII thereof, defendant denies each and every allegation, matter and thing therein contained, and especially denies that the plaintiff has been damaged in the sum of \$15,000, or in any sum whatsoever, by reason of any negligence on the part of the defendant, or at all.

FURTHER ANSWERING said complaint and as an affirmative defense to the alleged cause of action therein contained, defendant alleges:

That the place mentioned and referred to in said complaint as the place where the said Edgar Roman suffered said alleged injuries, is not a crossing, public or otherwise, neither has any right of way to the public or to the said Edgar Roman ever been acquired over or upon said Track No. 12 in any manner whatsoever; [43] that said Edgar Roman at the time and place mentioned and referred to in said complaint, was a trespasser upon said track No. 12, which was situated in the switch yard of the defendant in the city of Seattle; that if said Edgar Roman was injured, as alleged in said complaint, such injuries, and all thereof, were wholly caused by his negligence in crossing or attempting to cross said track No. 12, and by the negligence of the plaintiff herein and his wife, who then and there had said Edgar Roman in charge, in permitting and directing him to cross said track No. 12, and that the negligence of said Edgar Roman and the said plaintiff and his wife, was the sole and approximate cause of said injuries.

WHEREFORE, defendant demands judgment that plaintiff take nothing in his complaint, and that defendant be hence dismissed with its costs and disbursements herein.

BOGLE, MERRITT & BOGLE,

Attorneys for Defendant. [44]

State of Washington,
County of King,—ss.

W. H. Bogle, being first duly sworn, on oath says: That he is the agent and attorney for the

Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled action, and is authorized to make this verification in its behalf; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 17th day of February, 1923.

E. I. JONES,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of attached answer to 2d amended complaint received and due service thereof admitted upon 20 Feb., 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorney for Pltf.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [45]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Answer to Second Amended Complaint.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and for its answer to the second amended complaint herein, admits, denies and alleges as follows, to wit:

I.

It denies any knowledge or information thereof sufficient to form a belief as to any allegation, matter or thing contained in paragraph I thereof, and therefore denies the same.

II.

It admits the allegations of paragraphs II and IV thereof.

III.

Answering the allegations of paragraph III thereof, it denies any knowledge or information thereof sufficient to form a belief as to any allegation, matter or thing contained in paragraph III thereof, and therefore denies the same.

IV.

It denies each and every allegation, matter and thing contained in paragraph V thereof. [46]

V.

Answering the allegations of paragraph VI thereof, it admits that on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 a number of railway cars. Except as herein expressly admitted, defendant denies each and every allegation, matter and thing contained in said paragraph.

VI.

It denies each and every allegation, matter and thing contained in paragraph VII thereof.

VII.

Answering the allegations of paragraph VIII thereof, defendant denies each and every allegation, matter and thing therein contained, and especially denies that the plaintiff has been damaged in the sum of \$15,000, or in any sum whatsoever, by reason of any negligence on the part of the defendant herein, or at all.

FURTHER ANSWERING said complaint and as an affirmative defense to the alleged cause of action therein contained, defendant alleges:

That the place mentioned and referred to in said complaint as the place where the said Edgar Roman suffered said alleged injuries, is not a crossing, public or otherwise, neither has any right of way to the public or to the said Edgar Roman ever been acquired over or upon said Track No. 12 in any manner whatsoever; that said Edgar Roman at the

time and place mentioned and referred to in said complaint, was a trespasser upon said track No. 12, which was situated in the switch yard of the defendant in the city of Seattle; that if said Edgar Roman was injured, as alleged in [47] said complaint, such injuries, and all thereof, were wholly caused by his negligence in crossing or attempting to cross said track No. 12, and by the negligence of the plaintiff herein and his wife, who then and there had said Edgar Roman in charge, in permitting and directing him to cross said track No. 12, and that the negligence of said Edgar Roman and the said plaintiff and his wife, was the sole and proximate cause of said injuries.

WHEREFORE, defendant demands judgment that plaintiff take nothing in his complaint, and that defendant be hence dismissed with its costs and disbursements herein.

BOGLE, MERRITT & BOGLE,

Attorneys for Defendant. [48]

State of Washington,
County of King,—ss.

W. H. Bogle, being first duly sworn, on oath, says: That he is the agent and attorney for the Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled action, and is authorized to make this verification in its behalf; that he has read the foregoing answers, knows the contents thereof, and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 17th day of February, 1923.

[Notarial Seal]

E. I. JONES,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [49]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess his damages in the sum of Four Thousand Dollars.

E. C. DAY,

Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 15, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [50]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for
the plaintiffs and assess their damages in the sum
of One Thousand Dollars.

E. C. DAY,
Foreman.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Dec. 15, 1922. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy. [51]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Judgment.

This matter having come on for trial before this Court, on the 13th day of December, 1922, the plaintiff appearing in person and by his attorneys, Fred C. Brown and J. Stanley Tyrrell, and the defendant appearing with its witnesses and by its attorneys, Bogle, Merritt & Bogle, and testimony having been introduced on behalf of the plaintiff and the defendant and argument of counsel having been made and the jury having been instructed and having retired to deliberate, and on the 15th day of December, 1922, returned into court with a verdict against the defendant and in favor of the plaintiffs in the sum of four thousand dollars:

It is hereby ORDERED, ADJUDGED and DECREED that upon said verdict a judgment be entered against the defendant for Four Thousand Dollars (\$4,000.00) and costs and disbursements to be

taxed, and judgment is hereby entered against said defendant for said sum of Four Thousand Dollars together with the costs of disbursements herein.

Done in open court this 21st day of December, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 30, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [52]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Judgment.

This matter having come on for trial before this Court, on the 13th day of December, 1922, the plaintiff appearing in person and by his attorneys, Fred C. Brown and J. Stanley Tyrrell, and the defendant appearing with its witnesses and by its attorneys,

Bogle, Merritt & Bogle, and testimony having been introduced on behalf of the plaintiff and the defendant and argument of counsel having been made and the jury having been instructed and having retired to deliberate, and on the 15th day of December, 1922, returned into court with a verdict against the defendant and in favor of the plaintiffs in the sum of One Thousand Dollars;

It is hereby ORDERED, ADJUDGED and DECREED that upon said verdict a judgment be entered against the defendant for One Thousand Dollars (\$1,000.00) and costs and disbursements to be taxed, and judgment is hereby entered against said defendant for said sum of One Thousand Dollars, together with the costs or disbursements herein.

Done in open court this 20th day of February, 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [53]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

**Order Extending Time to and Including March 5,
1923, to Settle Bill of Exceptions.**

This matter coming on to be heard this 20th day
of February, 1923, upon the stipulation of the
parties to the above-entitled actions, through their
respective attorneys, for an order extending the
time for the settling and signing of the bill of ex-

ceptions in said actions, to the 20th day of February, 1923, or until such time thereafter as same may be heard by the Judge of the above-entitled court, and the Court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time for settling and signing said bill of exceptions be and the same is hereby extended to the 5th day of March, 1923.

Done in open court this 20th day of February, 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [54]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

**Order Extending Time to and Including March 19,
1923, to Settle Bill of Exceptions.**

This matter coming on to be heard this 5th day of March, 1923, upon the stipulation of the parties to the above-entitled actions, through their respective attorneys, for an order extending the time for the settling and signing of the bill of exceptions in said actions, to the 7th day of March, 1923, or until such time thereafter as same may be settled and signed by the Judge of the above-entitled court, and the Court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time for settling and signing said bill of exceptions be and the same is hereby extended to the 19th day of March, 1923.

Done in open court this 5th day of March, 1923.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 5, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [55]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Order Extending Time to and Including March 27, 1923, to Settle Bill of Exceptions.

This matter coming on to be heard this 27th day of March, 1923, upon the stipulation of the parties to the above-entitled actions, through their respective attorneys, for an order extending the time for the settling and signing of the bill of exceptions in said actions, to the 27th day of March, 1923, and the Court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time for settling and signing said bill of exceptions be and the same is hereby extended to the 27th day of March, 1923.

Done in open court this *27th* day of March, 1923.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 27, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [56]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that these causes came
on regularly for trial upon the stipulation of plain-
tiffs and defendant therein, by and between their
respective attorneys, that same be consolidated for
the purposes of trial in the above-entitled court,
before the Honorable Edward E. Cushman, District
Judge, sitting with a jury, on the 13th day of De-

cember, 1922, plaintiffs being represented by their attorneys, Fred C. Brown and J. Stanley Tyrrell, and the defendant being represented by its attorneys, Bogle, Merritt & Bogle and E. I. Jones.

WHEREUPON the following proceedings were had:

Testimony of Samuel C. Humes, for Plaintiffs.

My name is Samuel C. Humes; I reside at 3146 Thirty-fifth [57] Avenue South, Seattle, and have been a resident of Seattle for almost forty years. I was county engineer for four years. Referring to Plaintiff's Exhibit 1 for identification, I made said plat from the actual survey in June of this year. I was on the ground then and used to play there when I was a boy. I worked there when I was working for the city of Seattle, about 1911, locating streets and taking levels for a sanitary fill; in doing that work I had to go through that neighborhood. There is a path commencing at the corner of Second Avenue South and Dawson street. It is a sort of a "Y" shape. One trail starts in about the intersection of Second Avenue South and runs in a northerly direction, and 105 feet east there is another trail, and joins about 75 yards north of the center line of West Dawson Street. The trail runs in a northerly direction to South Seattle. It crosses the O.-W. tracks. We used to hunt down there when we were boys. I think it was about the same trail. It is well beaten. It used to go on an old dike where the old river used to make a bend in towards South Seattle and was a trail along that

(Testimony of Samuel C. Humes.)

dike. It was a well-traveled trail when I surveyed there in 1911. I was surveying there at that time about five or six months and saw people passing on said trail frequently, both children and grown-up people; it was used daily. It is the same trail I used when a boy playing over in there, and is the same trail that I saw when I went to make the map. It is a well-beaten track now. Just before you cross the railroad track there is a ditch along there with two planks over same. (Witness was then shown a photograph marked for identification as Plaintiff's Exhibit 2.) I recognize the locality shown in Exhibit 2. It shows two planks crossing the ditch and a trail leading up to the track. The track with reference to the ditch is on a fill of about six or seven feet, and that is a picture of the situation. [58] Exhibit 2 was then admitted. The track runs along the top of the fill. I know a man named William Buck and used to go to school with him; he resides in Georgetown; I used to play with him when we were children and have seen him using that path. Both of us would go over and across that path. Mr. Buck still lives in that part of town. The path crosses the track using the point "OO" as a base, 1811 feet north along the center line of First Avenue South and 301 east, to this point.

Cross-examination.

When I was a boy and played over this track of land the O.-W. R. & N. did not have this track there; the track was put there some time before

(Testimony of Samuel C. Humes.)

1911. The property on the east side of First Avenue is vacant property; there are several paths over this property, cow-trails and things like that. The trail coming from Dawson Street is an old wagon trail for a portion of the way. The wagon trail ends about 150 feet this side (south) or where the planks cross the ditch. I know of no reason why the wagon trail should end there. It might have gone some other direction. I would be willing to swear that it is exactly the same that I traveled before. When I was a boy the wagon trail went out a little to the left across First Avenue to the river bank. The river used to come down and wind around until they straightened it out, and there was a dike along the edge of the river. It used to follow that dike and go to the right over in a south direction. When you came from South Seattle it was a handy way of getting down over the hill and come down that way. It is a fact that in here (to the north of track 12) was a tide flat and water stood there. I cannot say that there was water where the scrap iron dump is now; there was some high ground [59] in there. There is water standing in there up to the scrap iron dump now. The water extended up to the dike. I cannot tell exactly where the dike was; it has been years and years. Where the trail hits the track it goes directly over. The trail crosses the track at about a 45 degree angle. The first time I saw this trail off the track was when I surveyed the map; that probably

(Testimony of Samuel C. Humes.)

was there just in recent years, since the scrap iron dump was there.

Redirect Examination.

“Q. I understand you to say that this trail along after it passes the track, along in here, is on the natural elevation that was there at the time when you were a child and played there?

A. Well, now, as far as the scrap iron dump is concerned, that wasn't there, but beyond it is.”

Testimony of Byron Leroy Edson, for Plaintiff.

My name is Byron Leroy Edson and I reside at 5403 Maynard Street, in the south end of Seattle; it is about three blocks from Argo Station; I have lived there about twenty years off and on; I am a married man and have children. I know where Second Avenue South and Dawson Street is. I used to travel on a path apparently continuing Second Avenue South about twenty years ago and said path is there at the present time. I should judge it runs into the railroad there about between Second and First and goes on over to the city dump. I used the trail there twenty years ago. It followed on that high ground above the swamp there and came out on what they used to call Smith's Lane. I used to solicit groceries for a grocery store in South [60] Seattle, and I would strike the dike on the river and come down the dike and then take this footpath. The path relative to the dike was

(Testimony of Byron Leroy Edson.)

about where the bridge over the old river is at the present time. Quite a few people used that path twenty years ago. Children used to go through there going to school at South Seattle. Georgetown did not have a school at that time, and all the children in Georgetown went to South Seattle. Those that lived at the lower end down near the river used this path. I have been over that path frequently recently. It is the same path that was there twenty years ago; it is right in the neighborhood of the same path, and has been in constant use. I saw the path last summer; it showed that it had been used since that time; it was well worn. I would say that Plaintiff's Exhibit 2 shows the going up on the track off from the east. There are planks across the ditch. I know where the path crosses the track. I have seen cars on the track; I have seen cars standing on the path, but the majority of the time I have went down there I have noticed there was an opening by the path. I built a road under the trestle, First Avenue; I think it is Dawson, or some such street as that. We built the approach up to the pavement under First Avenue and over to the track. The road ended at the path. I should judge that around 50 or 60, somewheres there, used that path daily. I used it frequently during shipyard activities and other people in my locality used it then. I have seen several of them use it. I used it myself every day. I used to walk to work in the afternoon and used to walk to work that way. I should say that the distance from

(Testimony of Byron Leroy Edson.)

Second Avenue and Dawson Street to the place where the path crosses the track was about a quarter of a mile. I have never seen any sign at the path, forbidding people using it. The track [61] has been there something like twelve or thirteen years, and I have used the path frequently during that time. The company did put up a fence there. The fence remained there for some time, but there was a hole cut through the fence and the fence was afterwards torn down or pushed down. It has been about eighteen months since the fence was up. It was a wire fence—pig wire or chicken wire. There was a hole there very shortly after it was put up and people were using it. I did not recognize any employees of the railroad company using it. The boys used to go there skating in the winter time—several of them, several times. I never was down there skating. The people from the south end in order to get to the dump, would have to cross the railroad track at that pathway. I have seen people using that path for the purpose of getting wood. In the city dump there were lots of boxes, barrels, refuse, wood, tin, sheet metal and old parts of automobiles. I know that a considerable part of the south end got their wood from that dump. There is no other path that crosses the track. There is no other way that you can get across the track without crossing over First Avenue, going up over the trestle. On First Avenue there is a high trestle.

(Testimony of Byron Leroy Edson.)

Cross-examination.

The fence along the track is between the track and the ditch. I should say that the fence was built seven or eight years ago. Since then until eighteen months ago, the fence was kept up, with the possible exception of a hole being made through it. In lots of places where they had dumped the refuse out of the cars it had shoved the fence over. During the war no one challenged me for going through the yard but once. [62]

There was an old wood road there twenty years ago. There is no one that I know of living near the intersection of this path with track 12. It is about five blocks to the nearest house. The only building inside of the tracks is the Ice Company and that is on the other side of the track and on the other side of the dump. That building is about a block from track 12. The trail hit the dike before the river was changed at about where the Interurban Bridge is at the present time on First Avenue. There was no necessity for, nor was there, any trail going over the track, as the trail is indicated on the plat—Plaintiff's Exhibit No. 1 for identification. Before the scrap iron was dumped or the garbage was dumped on this (north) side of the track, the water extended up to the dike. I did not notice any signs at the trestle, and I could not say that I looked for any. I went across the track for my own convenience. I was not working for the company.

(Testimony of Byron Leroy Edson.)

“Q. Now, that is not the only way that people from Georgetown, or from down in here, could get to the dump pile, is it? You don’t want the jury to understand that that is the only way they could get there?

A. That would be the shortest way.

Q. That is the most convenient way?

A. Yes.

* * * * *

Q. There were other ways in which you could get to the dump pile?

A. There was other ways.

Q. But this was the most convenient way for people living there? A. Yes. [63]

Q. (By Mr. JONES.) Mr. Edson, you say that at various times you crossed this track, or walked down the track? A. Yes, sir.”

I crossed the track at various times. Going from Duthie’s I would go down and take the trail, crossing the dump, and then take the other track and go down to Spokane Street. The incline on the other side of the grade was not much steeper than going up (on the south side). It is a very short grade, and I presume the grade is about six feet in twenty feet. There was a track through the scrap iron dump in places—little paths. I saw cars on this switch (track 12) several times when I walked through there. I have seen them switching cars in there. They dumped all their cars there and it was a track that was used a great deal. I remember another fence besides the railroad

(Testimony of Byron Leroy Edson.)

fence near the track. It was about 20 or 30 feet from the railroad fence. It ran down from First Avenue for a quarter of a mile or so; part of the fence was there before the railroad was in there; the tract was used for pasture and the fence was kept up for awhile. The last time it was used for a pasture was about six or seven years ago. It was only a barbed-wire fence; you could crawl through there, a couple of strands of wire through there. I used to crawl through the fence. It was built across this trail. I know of none of the fence standing now. I have been there lately and have never noticed any fence along there, excepting the railroad fence.

Redirect Examination.

I worked at Duthie's Shipyard for four years. If anybody from the east of First Avenue in the vicinity of Georgetown wanted to walk into Seattle or to South Park, they would have to either go over First Avenue or take that trail. First Avenue has a wagon road. The path would be the only way they could get to the dump, without walking down the tracks and going up around First Avenue and coming back around. [64] They would have to go eight or ten blocks further, or more than that. The other fence that was up six or seven years was on private property; it was not the property of the railroad company; it was put in there and used for a short time as a pasture. It never interfered with me; I always went through it and I have seen

(Testimony of Byron Leroy Edson.)

other people use it in the same way, frequently and continuously.

Recross-examination.

“Q. I believe you stated in direct examination that at times you would go up on this path to the track, and there would be cars standing on the tracks? A. Yes, sir.

Q. How would you get by them?

A. Well, there was a path on each side of the track.

Q. You just walked down alongside of the track until you got to the end of the cars, and then went over it? A. Yes, sir.”

Testimony of William Buck, for Plaintiff.

My name is William James Buck; I reside on Dawson Street and Third Avenue South in Georgetown; I have lived there about twenty-three years, and lived in Seattle about eight years before that. I know a man by the name of Samuel J. Humes and knew him as a boy. There is a path leads north from Second Avenue South and Dawson Street. It originally lead to a dike, and that dike lead down to South Seattle, where there was a saw-mill. I should judge that was about twelve or fifteen years ago. That path has been in use during the time that I have known it every day. I am a blacksmith. I would say that I have been over the path twice a day every day that I have been out there in this [65] twenty-three years. I would use the path in going to work and coming from

(Testimony of William Buck.)

work and other times going down there to get wood; there is lots of wood down there in that vicinity and I would go down there to get wood. It is near the Argo tracks in the Argo yard. I have seen quite a few people get wood there. I have never seen ten at one time getting wood there. I should judge that four or five people from the South end used it going to and from their work.

“Q. Do you know how many people in the South end that worked in the shipyard and used the path; if you know of your own personal knowledge, from time to time, that used this path; would you say twenty-five or fifty people?

A. There not many,—four or five.

Q. How often would people go down to that dump to gather wood and things from the dump? Would they use it daily for the purpose of going down there to get wood?

A. No, sir; I don't believe they would; I would say a couple of times a week.”

I guess about a dozen families in that vicinity would get their wood and supplies there. Many others would run in there with their automobiles and cross over that track, and come in where this sheet iron was, and pick out what they would want. You can get within fifty feet of the track with an automobile. It is a well-defined path, well trodden down for years. I could not say that I have ever seen any sign at the path. I do not remember seeing any signs warning people not to use the path.

(Testimony of William Buck.)

I was never forbidden to use it. I have seen children going to school across the track; but it is in the opposite direction from what that path is, that is, the children were going [66] east and the path runs north and south; but the children had to cross that railroad track. Well, I guess they crossed it at this point sometimes; they could either go down the track, or go around it. They would not use the path at all. The path was running north and south. They would use the path if they were going to the Georgetown school, some of them did, but most of them went to the South Seattle school, most of the children that lived in there.

I have noticed that the locality south of the dump would be frozen over in the winter-time and people used it for skating. I have seen women and children skating; I don't know as many men. They would use that path in order to get there. I could not testify as to whether it (the path) was absolutely and notoriously used. A great many people used it frequently. I never heard anybody being forbidden to use the path by the railway company. Plaintiff's Exhibit 2 shows the crossing over a small stream and the path that runs up on the fill or on to the track. The planks have been there nearly two years, I imagine. I don't remember how I got by there when the planks were not there.

Cross-examination.

I used the path this morning. I am pretty sure that I have used the path every day twice a day for

(Testimony of William Buck.)

the last couple of weeks. They used track No. 12 for empties most of the time; they also did some cleaning there; they cleaned out cars. They used the track pretty much. Between the ditch and the track there has been a wire fence, about eight feet high, made by mesh wire with one string of barbed-wire on top. The fence was kept up since before the war, I guess; it was built about 1916. For a year [67] or two there I think we got through a hole in that wire fence, right where the path is over the stream. I don't know who put the hole there. I have lived in that vicinity twenty-three years. I remember the tract of land being used as a pasture for cows. I remember a fence being built, about the width of a street, from the railroad right of way, running parallel with the track. There was no fence where the path was that I remember of. I never had to crawl through any fence at the path. There was a fill at the track and the cows could not very well get over; they often used to go down into the stream. Never saw any trespassing signs.

I am acquainted with Mr. Roman, plaintiff in this case, slightly. I have met him down there when he was getting wood and spoke to him a couple of times. I met Samuel Homes down there one day; he asked me if I lived around there; I told him "yes."

(Witness excused.)

The COURT.—We will take a recess for fifteen minutes, and go with reporter and counsel into my chambers.

(In Judge's chambers, in the absence of the jury, a discussion took place between Court and counsel in reference to condition of the two complaints.)

The JUDGE.—Where is your allegation in there that they were dependent on the deceased for support (referring to case No. 7019)?

Mr. BROWN.—It is a clerical error; that is where it should go.

The JUDGE.—Can't you sit down and try and fix up this record on the two cases, so that the trial can go [68] ahead? Here is an administrator that can be substituted in No. 7018, and as long as there is a party capable of suing there is no use going on and taking a chance on what looks to me like a mistake.

Mr. JONES.—I don't understand that the two actions can be brought by the administrator.

The JUDGE.—No, it has just been decided that the pain and suffering action has to be brought by the parents, and that the other,—they have brought it by the administrator, which is as I would have brought it, if I only had the case of Meshak vs. Seattle before me.

If you will fix up your amendments, I will allow them. You can dictate it to this reporter and have him run it out afterwards, and you can go ahead.

Mr. BROWN.—The title “James Roman, Administrator,” should be put on case No. 7018, and No. 7019 should be James Roman and Anna Roman, instead of the administrator.

The JUDGE.—I will go on with your cases if you file them,—your motions to-morrow morning, and it will be considered as though put in prior. It is purely formal, these amendments are, as long as I give you an opportunity to make your record; that is all you want, I take it.

Mr. BROWN.—In No. 7019 put in paragraphs III and IV of No. 7018, as a part of paragraph II of No. 7019.

In No. 7018 it should be “James Roman, Administrator,” and in No. 7018 substitute “James Roman and Annie Roman, husband and wife,” as plaintiffs.

The JUDGE.—Of course, there is an allegation in No. 7019 that the deceased was not married, and left no children. I guess you have an allegation in both cases, that the [69] parties for whose benefit defendant is sued, are residents of Seattle.

Mr. BROWN.—That is a part of these pleadings now.

(Trial resumed. Jury present.)

Mr. JONES.—If your Honor please, I forgot to state that I want the record to show that we except to the amendments.

The COURT.—You except to my order allowing the amendments?

Mr. JONES.—Yes, your Honor.

The COURT.—Exception allowed.”

Testimony of Dr. W. H. Corson, for Plaintiff.

My name is W. H. Corson; I am coroner of King County; have been such since the first of this year and was such on the 18th day of May of this year. I held an inquest to determine the cause of death of Edgar Roman. The jury met at the County-City Building, and went from there to some railroad tracks near Argo, Georgetown. The place where I went to on the railroad, the spur running from the railroad yards, where I was told the accident happened, there was a trail; it was a footpath and it was made by use. It was a very well-defined footpath. I cannot testify to the injuries of Edgar Roman directly.

Testimony of Dr. M. C. Lile, for Plaintiff.

My name is M. C. Lile; I am an orthopedic surgeon, licensed to practice in the State of Washington. About May, 1922, I had occasion to attend one Edgar Roman at the King County Hospital. As I remember he had a compound fracture of [70] of both legs below the knee, with the bones markedly displaced and considerable injury to the muscles and soft parts. An operation was done in which the wounds were cleaned and parts of the tissue removed, and the bones were set as well as possible to do so at that time. Subsequently—I cannot give you the exact date—a severe infection developed, and after that I made multiple incisions in one leg, at least. Subsequent to that time there was very material improvement for a day or two,

(Testimony of Mrs. Elizabeth McConahey.)

when this infection again began to appear, necessitating the amputation of one leg; I believe it was the right leg; but I could not be certain. After that, he died from the result of this injury.

Testimony of Mrs. Elizabeth McConahey, for Plaintiff.

My name is Elizabeth McConahey; I reside in Seattle and am head nurse at the King County Hospital; have been so since 1915. I recall the occasion when Edgar Roman was brought to the hospital. Both his legs had a compound fracture. The boy suffered very keenly, a very great deal of pain, especially after the infection developed. There were no expressions of pain by Edgar during the time he was there; he was restless, very restless; he had to be kept under opiates. He came in on Thursday and died on Monday, I believe.

Testimony of M. H. Stevens, for Plaintiff.

My name is Matthew H. Stevens; I reside at 134 Brandon Street, about two blocks from Dawson and Second South. I have lived in Seattle fourteen years, and about three years at my present address. There is a trail from West Dawson Street and Second Avenue South leading towards the city; it goes to the [71] old city dump. It crosses a railroad track before it reaches the city dump in two places that I know of; it is used extensively. To the best of my knowledge, people have gone up there for wood and different things on the old dump, metal and whatever they should want there that is thrown

(Testimony of M. H. Stevens.)

on the garbage dump. It is not used for coming into town or work that I know of. I have used the path, but not for a year; I used to use it every few days. I used to go up there for wood, and sometimes pieces of metal that I should want to use at the old dump. I don't know anything about people skating on the low land on the other side of the path. I saw no signs forbidding people using the path and was not prevented from going back and forth there. The path looks like it is used every day; it is well worn.

Cross-examination.

I didn't use it every day; every day that I have been there I have seen other people on it. I have seen them switching there quite often. The track, to the best of my knowledge, is used for storage and cleaning cars. There were cars across this path at times when I went over it. I would have to go around the end of them. Every time that I have been there there has always been a place to get around the end. There was an old fence there; but there was always a hole in it in two or three different places. Three years ago is the first time I knew anything about the place; I have not been over the trail for about a year.

Redirect Examination.

The end of the fence was just south of where the trail crosses. About a year ago, or a little over, that fence was pushed over by the railroad company. I saw where the fence had been pushed over by the dirt being piled on it. [72]

(Testimony of M. H. Stevens.)

Recross-examination.

I did not see them push it over; I was not there when it was done.

Testimony of Peter J. McGraw, for Plaintiff.

My name is Peter J. McGraw; I am general yardmaster for the Oregon & Washington Railway, stationed at Argo, Seattle. I have been yardmaster since June, 1918. I have been in the employ of the Oregon & Washington Railway Company since December 30th, 1909. At that time I was night yardmaster. W. H. Barr was yardmaster at that time; he is the present deputy jailer. I recollect the 18th day of May. As near as I can figure, there were about fifty-seven cars on track 12 in the afternoon of that day.

Cross-examination.

At that time of the year—May 18th, 1922— we were using this track extensively, probably a dozen or twenty times a day. We used this track for pushing in cars for cleaning purposes.

Redirect Examination.

I have seen men working there during the day cleaning out these cars at times. We notified the men when we pushed in cars there. The foreman at the forward end goes along the line and notifies them to look out, and we do that every time when men are working there. [73].

Testimony of T. M. Brown, for Plaintiff.

My name is T. M. Brown; I live at 310 Brandon Street, but at present am a patient of the Firland Sanitarium. I live about four blocks from Second Avenue and Dawson Street, and have lived there almost fifteen years. There is a trail from West Dawson Street and Second Avenue leading north. It leads up north, kind of winds around a little bit. There is one leads up to the railroad track, and there is another one leads off through under the First Avenue road. One of them runs up to the railroad track. It runs across a little ravine where they crossed the track. I suppose sometimes it is across it. There is a path beyond the track that runs down through the dump. I used the trail last year for hauling wood from the dump. There were others going up and down there. I used it maybe a couple of times a week, sometimes more. I cannot say how long the path has been there. I did not use it until 1921. It is quite a good trail. There were others getting wood there; three or four or five that I would see at different times. I could not say just how often I would see them, because I did not pay any attention to them. They were neighbors.

Cross-examination.

I never used this path until 1921. I did not go over the track to town. I generally went to town on the street car or on First Avenue. When I went to South Seattle, I always went down over

(Testimony of James Roman.)

Eighth Avenue. The only time I used the path was for hauling wood in 1921. I never used it to go to South Seattle or go to the shipyards. [74]

Testimony of James Roman, in His Own Behalf.

My name is James Roman; I am plaintiff in this action, and am the father of Edgar Roman. (Letters of Administration, marked Plaintiff's Exhibit 3 were offered and admitted.) I have lived in Seattle seven years; I am fifty-three years old; I lived in South Park awhile, and the last two years I have lived in Georgetown. My wife is living and six children, aged 15, ten, seven, six, four and three. The children reside with me. I am a laborer and have no trade. In 1911 I had my neck threw out of place. In the last two or three years I have not been able to do hard work, because of that injury and bad kidneys. I have rheumatics, and I came very near going paralyzed four times. I can't look up overhead to amount to anything; I go plumb crazy trying to look up overhead and work. I am better this summer than I have been in between two and three years; I have been trying to work five months, and got in three. Working for wages, I have worked about seven months in between two and three years. I have done better this summer than I have in between two and three years, and I worked a little over a month at one stretch. During the three years previous to this summer, I worked sometimes a couple of weeks, sometimes a month, and sometimes maybe six weeks. I had bad kidneys. I

(Testimony of James Roman.)

was hurt in the back about twenty years ago, and my back bothered me, and my neck and head. I would get down and out. I couldn't lift any more. From heavy lifting my spine gets on the bum until it runs me crazy nearly. My wife worked out. Sometimes she has got \$10 and the last job she has been on was \$13.20 a week. Edgar has supplied wood for people, mowed lawns, and when I was not able to keep us in wood from the dump, he would. He has taken care of little children for people, [75] done janitor work and peddled papers some. He mowed Mrs. Morris' lawn and worked at different kind of work for her. He dug potatoes for Mrs. Laughlin and put them away, and picked apples, and he would do anything that he could get to do. He worked whenever he had an opportunity. He attended school, and after school went out in the garden and worked or went after wood and anything there was to do. He would bring the money he earned to me or his mother and never spent any on himself. I had a garden about 100 feet square. He would take care of the garden when I was not able to take care of it. At school he was a bright boy and learned fast. (Plaintiff's Exhibit No. 4 was offered and admitted.) Anybody that is proficient in those certain lines of work would get a card. Edgar got most of the wood at the dump. He went to the dump by way of a path commencing at Second and Dawson. The path is about, I would judge, between a half and three-quarters of a mile from our home. In moderate

(Testimony of James Roman.)

weather he would make about two or three trips a week. On Saturday he would make maybe two trips or maybe just one, and then go of evenings. Sometimes he would get very near enough on Saturdays to last all week. In the year previous to May, we did not buy any fuel from any source; all the wood was obtained at the dump. There is a railroad track that you cross in going to the dump. The track is about half a mile from Second Avenue and Dawson. The path has been used extensively since I have been there.

“Q. How can you get to the dump which way? Are there other paths, or other ways to get to that dump besides this path?

A. It would be the nearest for me, the path, unless you would go around.” [76]

Some of the people were my neighbors and lots of them I did not know. When I crossed this track I have seen cars on it; they were in different positions; sometimes there would be an opening close to the path, between the cars; sometimes I would go around the end of the cars, and sometimes I would throw wood over between the cars, and then load it on my wheelbarrow and wheel it away. Sometimes I would wheel it across the track, put a board down.

On the 18th of May, 1922, Edgar had occasion to go to the dump. He left home about four o'clock with Charlie. I next saw him at our gate on a wheelbarrow, with Mr. Cole and Charlie. Mr. Cole lives over in the timber, close to the trail that

(Testimony of James Roman.)

goes to the dump. We took him in the house, the wheelbarrow and all. I got him on the sofa that was in the house—or the two of us did. They phoned for Dr. Guthrie. He came in, I think, something like an hour afterwards. My wife came in about twenty or thirty minutes afterwards. Edgar said he wished he could faint to keep from suffering, and asked for his mother. He lived four days and died on the 22d, at 7:30 in the evening. He was taken to the hospital between five and six o'clock. He suffered terribly, only when he was under opiates. He would groan some and was restless, and different times he had me to feel of his heart, the way it was jumping.

Cross-examination.

I live at 12 Brandon Street, and would judge that it is about three blocks—maybe not so far—from the O.-W. R. & N. track and roundhouse. Our house was got for us by Mr. Ewing from the O.-W. R. & N. I have seen the time there was an opening between the cars. When the cars were on the track over the path, I would sometimes go down on the fill and go around the [77] end; sometimes I could not and we would throw the wood over between the cars. I would cross between the cars on the drawheads, if I could not go around, that is, if it was too far. I never done that many times, but I have done it. I did not crawl under the cars. The boys never crawled under the cars while I was with them. I warned them as to that, and their mother and I warned

(Testimony of James Roman.)

them about looking out for cars around there. I knew this track was used a great deal; I knew it was a storage track in which they often times kept many cars. There were many times when the boys went for wood alone. Their mother never went but once; she walked over there one evening. It was me that went over there and got the first wood, after that I took the boys and showed them where the wood was, and if we were out of wood I either told them to go, or else the boys would see we needed it and went. I never told the employees of the road after the accident happened that I knew we were trespassing there. I supposed that from the place where the fence ran along the track, that from there on over to the dump, was railroad property and that the railroad track, of course, was railroad property.

Redirect Examination.

No one connected with the railroad company ever told me not to go there. There were no signs up. The fence was down since I have been there by the path. I saw a great number of people using the path.

Recross-examination.

I saw a switchman down there a few times. We had been going over to the dump for just about a year before the accident. We have not got anything from there since Edgar was killed. [78]

Testimony of Frederick Cole, for Plaintiff.

My name is Frederick Cole; I live at 210 Dawson Street; I have a house in there in the pasture, not on the street; I have lived there about four years. The trail from Second Avenue and Dawson Street passes my house. I have seen people using it frequently; it is not a daily occurrence. That path does not lead across track No. 12; it leads towards the dump.

I remember the 18th of May, 1922, when the boy was injured. His little brother came for me and I went back to assist him. He had the wheelbarrow wheeled already a piece, maybe a block or two. The injured boy was laying there on the wheelbarrow; he could not move. When I came up to the boy he was on the wheelbarrow. I assisted the little boy in wheeling him home. The boy was groaning.

Cross-examination.

My house is about even-ways between Dawson Street and the railroad track. I have been down as far as the railroad track. I noticed the trail that went to the bridge, the trestle. I don't know exactly the place; but as soon as they leave there they go over the railroad track.

Testimony of J. A. George, for Plaintiff.

My name is J. A. George; I am foreman of an engine for the O.-W. R. & N. I was in charge of an engine on May 18th, 1922. I had two helpers

(Testimony of J. A. George.)

with me—Frank McPaulin and Cliff Hatton. I went in on track 12 with one car at about four o'clock. When the engine and car moved that train I was by the engine and cars [79] on the ground. One of the switchmen was on the footboard and the other was making a coupling on the stock car with the car that we had. The engineer and fireman were in their places. The three of us were standing on ground together at head of the engine.

Cross-examination.

As near as I can recollect, there were at that time between fifty-five and fifty-seven cars on this track. I had just gone to work at four o'clock, and that was my first move. I had been working there for twelve, going on thirteen, years. I went in on that track maybe a dozen times a day for the last twelve or thirteen years. During that time I have never known of any other accident happening there; no accident whatever.

Redirect Examination.

No, sir; I have never known of any accident putting cars in on those tracks. There was no one had his leg cut off on one of those tracks in the Argo yard.

Testimony of Charles Roman, for Plaintiff.

My name is Charles Roman; my brother, the boy who died, was Edgar; I am ten years old. I remember the path at Second Avenue South and West Dawson Street. The path goes to the dump;

(Testimony of Charles Roman.)

it crosses the railroad track. I remember the last time I was there. Edgar and I left home about four o'clock, with a wheelbarrow and an axe. I was ahead when we reached the railroad track. Edgar was wheeling the wheelbarrow. There were box-cars on the track. I could not see the end of the cars. I looked down toward the end of the box-cars before I went across. I could not see any man. I could not hear any whistle. I could not see any engine. I went across the track and looked [80] down the track, I did not see any switchman or employee of the railroad. I could not see any engine or hear any whistle. There was nothing that attracted my attention that those cars were going to move. Then Edgar he came up to the track with the wheelbarrow and went to go across. He pushed the wheelbarrow between the tracks. When the wheelbarrow got on the track the box-car next to us was about a foot away. (Plaintiff's Exhibit No. 5, a photograph, was offered and later admitted.) That (referring to Exhibit No. 5) is me and Ed Sylvania; that wheelbarrow is Mr. Brown's, and it is the wheelbarrow that Edgar and I had on the day of the injury. The picture was taken on the railroad track. It was at the place where Edgar was injured. At that time I went to put the wheel over; it was in the position just like that position in the picture. When we were in that position that day the cars bumped and knocked the wheelbarrow and hit Edgar and knocked him down. I did not hear anything. The

(Testimony of Charles Roman.)

first thing I saw it hit the wheelbarrow and knocked Edgar down. He laid on the rail; his feet was on the rail, and his head was on the other side of the rail. It ran on his legs just enough to crush them, and then rolled back again. I took the wheelbarrow and turned it around and took him by the shoulders and put him on the wheelbarrow. Then I started down the hill, and I put my weight on the wheelbarrow and went down. I went across the planks. I went about to those two stumps, and then I went to get Mr. Cole. I came back ahead of him. Edgar had crawled about a half a block along the path. I ran and got the wheelbarrow and put him on again. Edgar said he would rather faint than have the pain hurt him so. I took him by the shoulders and put him on the wheelbarrow. We took him home. My father was working in the garden; [81] my mother was working at the can factory. I had to go back to the track after I got Edgar home to get the axe. There were three more cars past the path then. My mother came near five o'clock, when she got home. (Photograph marked Plaintiff's Exhibit 6 was offered in evidence and admitted.) That (Plaintiff's Exhibit No. 6) is at the gate where I came in between Second and Third on Dawson. It is the entrance to the path.

Cross-examination.

"Q. How many planks were there across this slough? A. Two planks were across.

(Testimony of Charles Roman.)

Q. On that day? A. Yes.

Q. Do you know who put them there? A. No.

Q. Now, Charles, when you and Edgar got up to the track, you say there were cars standing on the track? A. Yes.

Q. Was there a car right in front of you?

A. Yes.

Q. Then you had to go around the car?

A. Yes.

Q. How far did you have to go around; how far did you have to go down the side of the track to get around?

A. About a foot away from it.

Q. The car was about a foot away from you when you crossed; but how far down the side of the track did you go before you got to the end of the car?

A. I never measured; just a little ways.

Q. About a car-length? A. Yes, sir. [82]

Q. Were there any cars from where you went across to the trestle? A. No.

Q. Did you ever notice, Charles, that there has been a path to the tracks down there? A. Yes.

Q. Also on this side? A. Yes.

Q. Then you could have gone down with the wheelbarrow this way? A. Yes.

Q. Or over here on this side (pointing)?

A. Yes.

Q. You didn't have to cross the track right at that place where you crossed it, did you? A. No.

Q. But you and Edgar went just to the end, and as soon as you got to the end of the box-car you

(Testimony of Charles Roman.)

turned your wheelbarrow around and tried to get across. A. No.

Q. Didn't you try to get across there?

A. In just about a minute after we got there. I looked and listened before.

Q. Of course, you stopped and looked and listened; but you didn't go very far from the end of the car before you started to go across? A. No.

Q. When the cars bumped they didn't go very far, did they? A. No. [83]

Q. Just two or three feet?

A. Just enough to run on to his legs and back again.

Q. And if you and Edgar had been down a couple of feet from there that car would not have got him?

Mr. BROWN.—I object to that.

The COURT.—Objection overruled.

A. No.

Q. You boys had been down to get wood there several times? A. Yes.

Q. And sometimes your father went with you?

A. Yes, sir.

Q. And sometimes your mother went with you?

A. Yes, sometimes.

Q. And sometimes when there is a long string of cars on the track so you could not walk clear to the end of them, would you crawl under the cars?

A. No, we went over the top of them.

Q. Over the top, or between the cars?

A. Between them.

Q. Over the bumper?

(Testimony of Charles Roman.)

A. Yes, over the bumper.

Q. Over the couplings? A. Yes.

Q. Did you do that when your mother was with you sometimes? A. Yes.

Q. And you did that when your father was with you sometimes? A. Yes. [84]

Q. You don't remember about crawling under the cars? A. No."

Redirect Examination.

There are two paths leading up to the railroad track from those two planks. I took the one that went the longest—the one to the left. There is nothing on the right of way along there. The box-cars were about two or three yards across the path, about a box-car.

"Q. Was it two or three yards, or a box-car from the path where you crossed over?

A. Not quite a box-car.

Q. And you went to the end of that box-car, and a little beyond it? A. Yes.

Q. Then you crossed over? A. Yes."

Testimony of W. H. Barr, for Plaintiff.

My name is W. H. Barr; I am a deputy sheriff of King County, and am jailer at the county jail, second shift. I have been a paid deputy for nearly four years; previous to that time I was General Yardmaster for the O. & W. Railroad Company at Argo, Seattle, Washington; I occupied that position for about nine years and six months; I have been in the service of railroads about thirty

(Testimony of W. H. Barr.)

years. I have been practically everything on a railroad from water-boy up. I have been yardmaster, fireman of engines, conductor, brakeman and operator. Track 12 at Argo is the cleaning track; it begins between seventy-five and [85] and one hundred yards north of the yard office at Argo, and goes in a kind of northwesterly direction—I can't say exactly—and then turns at No. 13 switch to the right, going a little bit more direct north, and runs down and makes connections with what we call the Barton lead. There are about a half dozen footpaths crossing track 12. Before we put up the fence there were a dozen paths all the way across the yard there, everywhere. I cannot tell about Second Avenue and Dawson, because those streets, because when I was out there those streets were not platted; it was just a kind of swamp through there. I know where the scrap iron dump is located. It is swampy down there. There was a path leading across the track toward the dump at the time I was yardmaster a part of the time, and a part of the time it was not, because I tried to stop it. The wire fence was put up around the entire yard. It would last sometimes a week, and sometimes it would last twenty-four hours. I was never able to find out who would tear holes in the fence. I had no difficulties with the employees coming through at that place. I know that people used that path. While the fence was up they would come up on the path to the fence, and the fence went down to the First Ave-

(Testimony of W. H. Barr.)

nue South bridge, and through there, and they would go down and go around the wire fence to the edge of the bridge, and come back up, and go up to the dump. I could not say that quite a number used that path, because I never counted them; it was used. There was skating in the swamps in the winter-time; quite a few used the skating place. I have used it and have seen other employees there; also children and lots of grown-up people. They used that path, and they used No. 12 track and they used No. 13 track to the skating place. There is wood in the dump. I have noticed people using the [86] path for the purpose of gathering wood. I would not like to say frequently, because I never gave it any particular attention. I knew as an official people were using the path. There was nothing to keep them away. They came down where the garbage wagons comes down, and they came in from South Seattle, and they came across there, and that is one thing that I tried to get a fence up and keep it up to keep people out. That is not a reverse curve; that is a curve.

“Q. Did you have any knowledge that the public was using this path?

Mr. JONES.—I object to that as immaterial.

The COURT.—Objection overruled.

Mr. JONES.—Note an exception.

The COURT.—Exception allowed.

A. Yes, sir.”

I know from experience the position of the crew in backing cars. There are certain positions at

(Testimony of W. H. Barr.)

certain places. When there are cars being pushed ahead or back of the engine at certain places, a man must be on the head car. It is according to where they are passing, going over crossings, or things of that kind, and there are other places that all you have to do is to know the track to be clear. He has got to have knowledge of that before he moves. Up to the time I left the company there was not notice posted at this path warning people to keep away from it. There were notices down on some of the others. Where the tracks come from the main line into Argo, I had signs put up, and where the gate comes in, alongside of my house from Seventh and Lucile, I had to put up a sign by my gate, and when we put the big gate and the fence there, at Colorado Avenue, we had a sign put up there, and I had one sign down where I had the employee gate on the turnstile. I have [87] taken examinations as conductor, brakeman, and general yardmaster. I took a general course of examinations in the Union Pacific Educational Bureau. I had thirteen foremen under me. I had to have a foreman with every engine. I knew a man by the name of George working down there.

Cross-examination.

When I saw people trespassing on this track I did not tell them to get off, nor instruct my men to put them off. If there was a sign at the First Avenue Trestle, it wasn't put there with my orders. I would not say whether there was one or wasn't. It is not

(Testimony of W. H. Barr.)

necessary at all times when you are pushing a car on a track to couple it up in a switch yard to have somebody back at the end of it, nor is it necessary to have a man back there at the end of a string of cars when you are coupling up cars. While I was working there a fence was built. I left there the first day of June, 1918, or 1917; I cannot say for certain right now. The fence had been up some years before I left; I think it had been up two years.

Redirect Examination.

It is what you intend to do after you couple in on to that car, what you would do, as to backing an engine into a car without seeing the end of the cars. If there were fifty-seven box-cars along there, it would require more than the coupling up of an engine to back the car three or four feet.

Recross-examination.

It is all according to how many cars there were in the last cut as to whether or not a string of fifty-seven cars would be moved two or three feet, assuming that *there a* couple of spaces. [88]

Testimony of John Sylvania, for Plaintiff.

My name is John Sylvania; I live at 316 Brandon Street and have lived there ever since 1909; I am a married man and have children. I know where the corner of Second Avenue South and Dawson Street is; there is a path there; it leads to the railroad track and then over to the city dump. I used it quite often. I see other people using it. About a

(Testimony of John Sylvania.)

year ago I was not working, and I was there regularly every day. I saw about fifteen or thirty sometimes using that path, and every time I used it I saw other people using it and crossing the track at that place.

Cross-examination.

I have not used it lately. I used it for hauling wood. I do not use it now because I am working. I have not used it since last spring and summer. I used a wheelbarrow, but I carried the wood on my shoulder across the track there. I left the wheelbarrow on this side and carried the wood over. It was easier for me to carry it over—much easier—than to run the wheelbarrow over the track. It is a little bit hard to get a wheelbarrow across the tracks. There were no boards there to make a crossing, or anything of that kind. When you get across the track there is quite an incline. It is low ground across the track. I think the ground at First Avenue is about level with the track. The track is graded up to quite a height there. I first used the path about two years ago. There was a fence there once. I never went through when the fence was there. I was there when the fence was up, but I never went across. When I got to the fence I used to get my wood under the bridge. I would go down on the trail and then branch off this way to First [89] Avenue and get my wood there.

(Testimony of John Sylvania.)

Redirect Examination.

Last spring and summer I used the path extensively and saw many people. I saw no sign up there.

Testimony of Oscar Adolph Burke, for Plaintiff.

My name is Oscar Adolph Burke; I reside at 5806 First Avenue South; it is about seven blocks from West Dawson Street and Second Avenue; I have lived in that vicinity all my life.

I am familiar with the path that leads from Second Avenue South and Dawson Street north. It runs into that pasture. There are two or three branches of that path in there; one part of it runs over that track there, over to the city garbage dump. It is a well-beaten path. It has been used ever since I remember of. It is about four years since I used it. At that time it was used quite a bit. I used it before they built the fence there and I used it afterwards. I cannot remember exactly how long the fence was up. It was up a short time. Everybody that needed wood down there or anything would use that path. Not everybody living in that vicinity used it; some would buy their wood. I could not say how many used it.

Cross-examination.

The other part of the path went down to the pasture and over the ditch, down there where people kept their cows. I used to keep a couple of horses down there and would have to go down and get them. Not all the people would walk along the

(Testimony of Oscar Adolph Burke.)

path went over the railroad track; some of them did. Some went down to get [90] their cows and some went down to cut Christmas trees. When the fence was up there, I went straight down over the bridge. When the fence was up there was a branch of this path that went down to the trestle, and I went over that road when the fence was up. There is a wagon road through there; I have driven over that road with a horse. It is just a little ways from the railroad. That path is pretty close to the bridge.

Testimony of Ambrose McCoy, for Plaintiff.

My name is A. D. McCoy; I live at 107 West Bennett Street, which is about two blocks from Second Avenue and Dawson Street. I have lived there sixteen years.

There is a path leading from Second Avenue South and Dawson Street north across the railroad track to the city dump. It is a well-beaten path; I have used it. I have seen different people in the path. There has been a path part way; it has been changed several times; there has been a path there ever since we have been there, nearly. There are several places where there are little paths used to go across there; but this path has not been there since the road was there. I used the path ever since I was a boy. There was woods over there, and we used to play over there, and I used it mostly for that.

Cross-examination.

That path over the railroad has not been there as

(Testimony of Ambrose McCoy.)

long as the path that leads into the road. That other one has been there, I believe, I am not sure of it, but about four or five years. I think that within the last four or five years there was a fence built there (the railroad track) for awhile, but I [91] think it was knocked down. It is down now, I know. I might have crossed when the fence was up, but I do not know for sure.

Recross-examination.

There was a path leading over to South Seattle a number of years ago. There is yet, in fact, but it is never used. It was a dike leading over to South Seattle. It was in the vicinity of the path there. The old path was down about a block from where that crosses that railroad track now, and it was a dike, and it went across the railroad track and went across to South Seattle. Track 12 was not there then, but the main tracks were there. The old trail hit the dike about approximately where First Avenue and the tracks meet. They would cross the tracks near First Avenue.

Testimony of Mrs. Bertha Evans, for Plaintiff.

My name is Mrs. Bertha Evans; I reside at 509 Bennett Street, and have lived there twelve years. I knew Edgar Roman for almost two years. He was a very good boy; he helped his father in the garden and always helped on something outside. He helped to clean the yard, and I know he helped this lady clean her yard. He did not sell papers

(Testimony of Anna Jane Roman.)

to my knowledge. I could not say that he made gardens for anybody else. I have seen him delivering washing. I would consider him an industrious boy.

**Testimony of Anna Jane Roman, in Her Own
Behalf.**

My name is Anna Jane Roman; I am the wife of James Roman, and the mother of these seven children mentioned. I [92] was working until I came down here. During the last three or four years Mr. Roman has been quite sick a great deal of the time, about his neck being thrown out of place, and having muscular rheumatism, and he also has been bothered with kidney trouble a good deal. Edgar delivered papers. He brought in \$10 at one time. That was the highest I remember of him bringing in at one time. Several times he brought in \$5 from the paper route, and many times \$2 or \$3 at a time. Then sometimes he went out and hoed gardens, and he quite often went out and mowed lawns, or would run errands to stores for different ladies, and most anything that he could get to do. He always carried the laundry back and forth for me, when I took in laundry. Edgar did most of the gardening, because for almost two years Mr. Roman has been unable to do gardening, especially a year ago this last summer. The last year or so I haven't bought any wood, scarcely at all; Edgar always brought it in. Just previous to his death he was going out on a ranch this last summer at the

(Testimony of Anna Jane Roman.)

rate of \$30 a month and board. He always brought his money straight home and gave it to his father or to myself.

I was working on the 18th of May and returned home about five o'clock. I found my boy hurt very badly. He was in the house on the couch. I did my best to strip him of his clothes. His legs were bleeding terribly. He begged me to relieve him of his pain. I took off his shoes. I cut all the clothing off clear above his knees. They were all stuck with blood, and I tied strings just below the knees, because he was bleeding so bad. I don't remember what time the doctor came. He was taken to the hospital right after the doctor got there. He kept asking me to do something for [93] him to relieve him, because his legs hurt so badly. I was at the hospital most of the time. He suffered a great deal of pain. They had to keep him under morphine or opiates all the time, and they would put him under the influence so much that he would maybe get an hour's rest, he would be more quiet, but he slept very little during the four days and nights and kept moaning and asked me to relieve him of the pain. He died Monday night at 7:30, May 22d.

Cross-examination.

“Q. You knew, from what the boys told you, where he had gotten hurt? A. Yes.

Q. Have you ever been over to the scrap pile, or the place where they got wood, with them?

A. Yes, sir.

(Testimony of Anna Jane Roman.)

Q. Many times?

A. No, not many times; very few times.

Q. Were you ever over there with them when there were cars standing on the track in front of this path that leads up to it? A. Yes, sir.

Q. What would you do then?

A. I could see down the road to the right of me; I could see that that end was clear. There were quite a number of cars down that way, but, on the other hand, I could not see because it went around under the bridge, and I could not see. So I had Edgar and Charley and Clayton all with me, and the wheelbarrow, and I waited there until Edgar went around the end to see how far [94] it was, and see if he could see an engine or anything coming, and then he come back and said that he could not see anything. I could see from the other end, where I stood, so when I could not see anything I had him and his brother Charles get over the couplings, or drawheads, right between the two cars, and I pushed the wheelbarrow under, and they got hold of the wheelbarrow on the other side, and helped to pull it over, and then I had Clayton get over, and then I got over.

Q. Over the couplings?

A. Yes, sir; over the couplings. I climbed up on the ladder that leads up on the side where the brakemen get up on, and then went over.

Q. Did you ever get under the cars?

A. No, I never went under the cars.

(Testimony of Anna Jane Roman.)

Q. Did you on May 24th in a hearing before Dr. Corson, Coroner, in answer to a question put to you by Dr. Corson (page 9), the question being: 'Did Edgar tell you anything about how it happened?' testify as follows: 'Well, he told me as best he could. He was feeling so bad I didn't ask him many questions; but he said that,—he just said that he had been run on to with a car running on to his legs, and hurt him. I didn't ask him very many questions. I had been over there many times with them myself, and I thought perhaps he was doing the same as we had always done, lots of times, went right under the cars, like that, and took the wheelbarrow; but the boys say they were not'?

A. I don't remember what my testimony was to Mr. Corson at all. I can't remember it; I can't recall it. I was asked [95] the next day afterwards, and I could not tell it.

Q. You would not say that you did not say that?

A. I could not say I did, or I didn't say it; I don't remember what my testimony was.

Q. Is that a fact?

A. It is an absolute fact, I can't remember.

Q. Is it a fact that you did often crawl under the cars?

A. No, sir; I never crawled under the cars that I remember of. I crawled between the cars once, but not under the cars,—under the couplings at one time, I crawled under, and two times I went over; all the times I remember of there being cars over that path.

(Testimony of Anna Jane Roman.)

Q. Is it a fact that you stated in this answer to this question that you had been over there with them many times?

A. Yes, sir; I had been over there many times with them.

Q. Did you know that you, nor anyone else, had any right to cross that track?

Mr. BROWN.—I object to that. It implies that they had no right; it is a double question.

The COURT.—Objection sustained.

Q. Do you know that you had no right to go across there?

A. I didn't know but what it was perfectly right for anyone, because there were so many going across there; I supposed it was all right for anyone to go across there.

Q. Did you not, Mrs. Roman, on May 24th, before the Coroner, Dr. Corson, testify as follows: (page 16) in answer to a question put to you by Dr. Corson: 'Do you know anything else, Mrs. Roman, that the jury ought to know about this case?' And did you not testify as follows: [96] 'I don't know, unless it would be to warn people to keep their children away; that is all I know; that is all I know. I might say they are trespassers when they come along here, this place, and the company have to have those to put their cars on.'

A. I don't remember making that statement at all; I don't remember of it.

Q. Will you say that you did not?

A. Well, I don't know that I could hardly say

(Testimony of Anna Jane Roman.)

that I didn't; because I don't remember. I can't remember what my evidence was in that at that time.

Q. Do you remember the next day, that is the 19th or 20th, at the hospital, talking to Mr. Mallett, the man sitting here, in regard to the accident?

A. I remember of him coming up there.

Q. Do you remember saying to him at that time that you realized that it was you or Mr. Roman's fault in letting the children go over there?

A. No, sir; I could not tell you what I said to Mr. Mallett, to save my life.

Q. You would not say you didn't?

A. I could not say I didn't. You would have to ask someone else; I don't remember what I said to him.

Q. Did you not at that time and place say to him, that you knew that the boys were trespassers there?

A. No, I could not say that I said that, or that I didn't say it; I don't remember what I said to him."

Redirect Examination.

The boy died on the 22d and the funeral was on Thursday; [97] he died on Monday and the funeral was on Thursday. The inquest was held on the day before he was buried.

Testimony of Charles Roman, in His Own Behalf (Recalled).

I remember the day after the accident going down to the yard with Mr. McGraw and Mr. An-

(Testimony of Charles Roman.)

derson, two railroad men, to show them where the accident happened. I remember their asking me why I did not come to them for help. I did not say that I was afraid to ask any of the railroad men for help. I did not say that I didn't have any right on the track. I didn't say that I was afraid to come through the upper end of the yards, because the railroad company would not let me.

“Mr. JONES.—Your Honor, I have a motion at this time.

The COURT.—The jury will be excused, and remain on this floor, in the corridor, within the call of the bailiff.

(Jury excused from courtroom.)

Mr. JONES.—Comes now the defendant and challenges the sufficiency of the evidence, and moves the Court for a nonsuit, and for judgment of dismissal of the two actions herein, upon the grounds and for the reasons, that there is a material variance between plaintiffs' complaints and the proof thereof, and that the evidence offered by plaintiffs fails to show any negligence on the part of defendant sufficient to entitle the plaintiffs to recover herein, and that the plaintiffs' evidence established that the decedent, Edgar Roman's injuries, [98] were caused solely by his own negligent acts and omissions, which directly contributed thereto, and by the negligent acts and omissions of the plaintiffs, the father and mother, which directly contributed thereto.

(Argument by Mr. Jones.)

The COURT.—There seems to be on your motion

(Testimony of E. R. Perry.)

two questions; the first question is, does the evidence show indisputably that the deceased was a trespasser? If he was a trespasser there is no evidence of negligence; that is the first point in the case. But under the plaintiffs' evidence regarding this path used by the public, and obstructed by the car, the Court finds a simply leaving *on* the path for a few feet, to go around the car, that was obstructing the path, it didn't make the deceased a trespasser.

On the other question left upon your motion, is whether the deceased was shown to have been guilty of contributory negligence, or his parents, were shown to have been guilty of contributory negligence, for whose benefit he was working. The doctrine, of course, generally is, that questions of contributory negligence are questions for the jury to decide, under all the evidence, and not for the Court to decide, and certainly there is not here made out such a conclusive case of contributory negligence on either the part of the parents, or on part of the deceased, to warrant the Court in taking the case from the jury. The motion is denied.

Mr. JONES.—Let the record show an exception.

The COURT.—Exception allowed." [99]

Testimony of E. R. Perry, for Defendant.

My name is E. R. Perry; I am a court reporter; I reported the testimony of the witnesses at an inquest held on May 24th, 1922, on an accident in the yards of the O.-W. R. & N. Railroad. I took down the testimony of all the witnesses at that time.

(Testimony of E. R. Perry.)

“Q. I will ask you to turn to the testimony of Anna J. Roman, and I will ask you if you find this question: ‘Did Edgar tell you anything about how it happened?’ A. Yes, sir.

Q. Just read to the jury what the answer to that question was.

A. (Reading:) ‘Well, he told me as best he could,—he was feeling so bad I didn’t ask him very many questions—he just said that the train ran to him, that the train ran on to his legs, and I didn’t ask very many questions. I had been over there many times with them myself, and I thought perhaps he had did the same as he had always done lots of times, went right under the cars like that, and took the wheelbarrow; but he says that they were not some of the cars there; there is a big long string, and there will be a small opening between sometimes, and they will be put together.’

Q. I will ask you to turn to the testimony of—I think it is the last bit of testimony in the transcript, where you will find this question by the Doctor again: ‘Do you know anything else, Mrs. Roman, that the jury ought to know about this case?’ And state what the answer is.

A. (Reading:) ‘I don’t know, unless it would be to warn people to keep their children away. That is all I know; that is [100] all I know. I might say they are trespassers when they come along here; this belongs to the company, and they have to have this to put their cars on; that is all I know.’ ”

(Testimony of E. R. Perry.)

Cross-examination.

She was much agitated at that time. As I understand, it was before Edgar was buried, about two days after his death. As I remember she was much agitated. Of course, I could not see the way she was illustrating, because I was busy writing. She was standing there, I imagine, pointing to what she meant, but I could not see her. All I know is what she said. I did not see her motions at all. She testified as I have read.

Testimony of Cornelius Hageman, for Defendant.

I live in West Seattle; I am a civil engineer. I was employed by the Oregon & Washington Railway Company from January, 1911, to 1919. I am not now in the employ of the railroad company. I am superintendent for J. A. McEachern Company, a contracting company. We are building the First Avenue trestle, which crosses railroad track No. 12. I am acquainted with track 12. I help construct same. It was built in 1913. It is used principally for the storage of stock cars and cleaning stock cars. It is used a great deal; you might say continuously. The ground on both sides of the track is partly a marsh, "tule" marsh, I guess you would call it on both sides of the track, excepting a part of it is filled with the garbage dump. The garbage dump would be right out from First Avenue. I never noticed any trail that crosses this (dump) part of the property. I do not know of any trail across the track at that place. In [101] the

(Testimony of Cornelius Hageman.)

spring of 1916 we built a fence around the entire yard. That fence on the south side of the track extends all the way from the trestle to the intersection of Colorado Avenue. It is built right on the right of way line. There is a ditch on the outside of the fence; it is not on the company's property. I worked for the company until 1919. I was frequently down in the yards at this place. I took charge of the building, completing the yards in 1912. They were being constructed from 1910 until about 1913. I had charge of the construction of the yards and the shops. I was down in the yards very frequently until the time I left. I was not aware of any place that the public were continuously and notoriously using crossing the track in the yards. No such place was ever brought to my attention.

Cross-examination.

I am a civil engineer. I laid track 12. Mr. Barr, the yardmaster, had nothing to do with the building of the tracks at all. I was under G. R. Hohlman, chief engineer. I was on the ground; I would be out there maybe once or twice a day. I am unable to tell you the length of track 12, because it is too long for me to remember. I never heard of any path crossing track 12 and I never saw it. Track 12 was built in sections. We built numerous tracks during that same period. We built the track on through, and connected with the N. P. at Duwamish Avenue. There are no paths crossing that track. There is a street crossing it—East

(Testimony of Cornelius Hageman.)

Marginal Way crosses it, and a track crossing above First Avenue South. There are no paths along there. It is a continuation of the same track going out on Harbor Island where the Duthie Shipyard used to be. That track is a mile long from the connection of the N. P. end. Spokane Street crosses that track; it is one block from the water. [102] There is a street the full length of the track. There is swamp land west of tracks 12 and 13. I am unable to tell you who maintains the ditch. That is not on the company's property, that runs along the east side of track 12. There is a ditch there; I do not think it was dug for the purpose of protecting the track. I imagine it is constructed for drainage purposes. It was not constructed for the purpose of protecting that embankment. The track where the refuse is thrown is a long distance from the ditch. That is not a movable track. They could move it.

Redirect Examination.

I did not say they did it; they could do it. I don't know whether they did it or not.

Recross-examination.

I did not construct the ditch; I had nothing to do with the ditch. There is swamp land on both sides of that track. You would not necessarily make allowance for a ditch for the purpose of protecting the track; you can make a fill. The fill of that track is not caused by refuse being thrown out of the cars. The fill was made with the hauling of

(Testimony of Cornelius Hageman.)

dirt from Renton. I never saw any lumber taken off the cars and thrown on the right of way. I am down there every day. I was down there at one o'clock today. I was working right off track 12 unloading lumber. I do want to tell the jury to-day that there is no path across track 12.

Testimony of J. L. St. Onge, for Defendant.

My name is J. L. St. Onge; my business is bridge and building foreman for the O.-W. R. & N. I have instructions to [103] build and repair fences. The fence along track No. 12 on the west or south side of it, was repaired by my orders at various times. That was during the years 1917, 1918 and 1919. Some of the men I sent to repair the fence were George Nicholson, Henry Halvorson and Louis Matthewson.

Cross-examination.

My territory extends mostly between Seattle and Tacoma. I repaired the fence during the war. It was a war measure.

Testimony of W. W. Finch, for Defendant.

My name is W. W. Finch; I am Superintendent of the King County Home; I live right there. I was employed as watchman in the yards of the Oregon and Washington Railway at Argo in 1916. I know where track 12 is. It was a part of my duty to keep people out of this yard from First Avenue on down to Argo. I performed that duty as a watchman. I had occasion at times to oust people

(Testimony of W. W. Finch.)

from the yards. There was no particular point along track 12 that people were in the habit of trespassing.

Cross-examination.

I believe that 1916 was the only year I was there. The Argo Yards run away north of First Avenue and from there clear down to Argo Station. My beat ran clear away down there north of the First Avenue trestle and ended at what we call along 11 and 12. I started from the Argo yards. I went from the north end clear through to the Argo crossing. I went along both sides, from fence to fence. My hours were from seven to seven in the daytime. I know where track 12 is. I don't know where any path crosses track 12. I know where the dump or scrap heap is. I don't know of any path across there. The big dump heap is on the [104] outside. People came into the dump heap on the First Avenue road. There was a plank road off of First Avenue, and they went down there and made a circle down to the dump heap. I don't know of any path leading across track 12 south of the scrap iron dump.

Testimony of Henry Matthewson, for Defendant.

My name is Henry Matthewson; I am a carpenter, working for the O.-W. R. & N. under Mr. St. Onge. We repair fences and anything that comes under that department. I know where track 12 in the Argo Yards is located. I remember a fence along the south or west side of track 12. At various times

(Testimony of Henry Matthewson.)

I repaired the fence from the First Avenue trestle on down toward Argo. We repaired the whole fence from the Argo crossing on the east side of the yards and went over on the west side and followed up to the machine shop. We repaired it all along. The last time was the latter part of June of this year. We have been repairing it at various times for the past four or five years.

Cross-examination.

We repaired the fence on both sides of the yard. I know where track 12 is. We have repaired the fence where the well-beaten path crosses track 12. I know where the dump is. I have not seen people on the path. There is no path crossing the yard. The dike is north of the garbage dump. There is no dike on the east side of track 12. Track 12 is on the west side of the yard. There is a ditch along the west side of track 12. There are two planks over the ditch. There is no path. I have seen the plank there; there is a fence there, you know. I never had any orders from the railroad company to kick those planks into the ditch. [105]

Redirect Examination.

I do not know whether or not the fence is built on the line.

Testimony of George Nicholson, for Defendant.

My name is George Nicholson; I am a carpenter working for the O.-W. R. & N. under Mr. St. Onge. I have had occasion to repair the fence along the west side of track No. 12 in the Argo Yards, from

(Testimony of George Nicholson.)

the First Avenue trestle on the south to the Argo Station. The last time I did it was in July of this year. In 1917 and the fore part of 1918 we repaired it quite often.

Cross-examination.

That was during war times. In July, 1922, after the boy was run over, was the last time I repaired it. The fence was leaning over pretty bad right at this path. At the north path the fence was down. We did not repair it where was it was down. As I remember right, this (fence) was not clear down at the path. There was a hole right at the path. We fixed that hole. I did not see any people using it. Plaintiff's Exhibit 2 shows the planks that crossed the ditch. I could not show the fence here (on Exhibit 2) because the fence should be in here (indicating).

Testimony of Henry C. Halverson, for Defendant.

My name is Henry C. Halverson; I am a carpenter, working for the Oregon and Washington Railroad. I know where the fence is along the right side of track 12 in the Argo Yards. I have repaired it at various times during the last three or [106] four years. I have repaired it all the way from the trestle where it crosses First Avenue on the north to Argo Station.

Cross-examination.

I am still working for the same company. My territory is from Seattle to Tacoma. I cannot say exactly the last time I repaired the fence, but about

(Testimony of Henry C. Halverson.)

a year ago; there are several of us, and they do not send the same one all the time. Mr. Nicholson was not with me the last time I was there. As far as I recall it was a fellow by the name of Wright. I don't know that there is any path crosses track 12. There is a kind of a path up to it. There is a fence to the north of the path clear to the trestle. It has been there every time that I was down there. I have been there a number of times during the last seven years, and there has always been a fence along there.

Redirect Examination.

At the point of this path there was always a fence there and I have had occasion to repair the same.

Testimony of M. R. Pomeroy, for Defendant.

My name is M. R. Pomeroy; I am a special officer for the O.-W. R. & N. Company; have been working as such for a little over two years. I know track 12 belonging to the company in the Argo Yards. At track 12 there is a ditch on the outside of the fence. I suppose the company's property extends to the fence. The ditch is on the other side of the fence. I have seen some planks across that ditch about four or five hundred feet from First Avenue. I have gone down a good many times and thrown them in the ditch to keep people from coming in there. [107] There is no path crossing track 12. Whenever I found anybody in the yards that did not belong to the company, I ordered them out. There is no place in the yard or on track 12 where it

(Testimony of M. R. Pomeroy.)

was commonly and notoriously used by people to cross.

Cross-examination.

I have been with the company for two years. Previous to that I was in the fish business in Alaska. I moved to Seattle on the first of September, 1917, from Astoria, Oregon. I was born in Oregon; was sheriff of Clatsop County, and after I went out of office I went into the insurance business. I never worked for a railroad company before. My duties are to look after the company's property and take care of it. I cover all the company's property located in Seattle. I went to work for the company November 7th, 1920. When I first went to work for the O. & W. I was working on the night shift in the Argo yards continuously. I was in the yard every night. I would arrive there practically between six and seven and I never left until 5:25 in the morning. I worked every night from the 7th of November, 1920, until the 11th of January, 1922. My main duties were to protect all property.

Testimony of J. F. Powell, for Defendant.

My name is J. F. Powell; I was night watchman in the employ of the Oregon & Washington Railroad in the winter of 1914 and 1915. I was stationed at Argo, and had occasion to watch the tracks from First Avenue clear to Argo. I know track 12. I had occasion to put people out of the yard. I know of no place on track 12 that was open, notorious and common in crossing. [108]

(Testimony of J. F. Powell.)

Cross-examination.

I worked from 1914 and 1915—from October until February. I went to work at 6:00 o'clock and quit at 5:30 in the morning. My duties were to watch the cars and property. I went all over the yards. I have seen loads on track 12 other than manure. We always went over that track. I could tell whether or not there was merchandise in the cars on track 12 by their being sealed. I knew the general use of this track—that it was for empty cars and for cleaning cars. I have seen loads over on that track. I am not mistaken as to the track. The Argo Yard must be at least a half a mile long. It being sometime ago, I may be mistaken as to loads.

Testimony of James A. Hendricks, for Defendant.

My name is James A. Hendricks; I am an engineer working for the Oregon & Washington Railway. I was working for that company on the 18th of May, 1922, and went to work at four o'clock at that time. We had occasion to shove in one car on track 12 on that day. It was about fifteen minutes after I went to work. We put this car or cars, not over two, right on 12. We shoved it in the clear. I could not say how many cars were on track 12 at that time; I should judge forty or fifty. We were just shoving that car in the clear, that is all. We had hold of that car, and we had to put it in the clear, and we had to shove it in a little bit to get in the clear of No. 11. There

(Testimony of James A. Hendricks.)

never was any pathway or track known to me crossing track No. 12 between First Avenue and Argo Station. The track is all fenced in. The only passage I know of is up at the roundhouse where there is a gate. Right through the roundhouse there is a gate; the only entrance there is through the yard. [109] The roundhouse is about five blocks from First Avenue. That is the only way they could get in there that I know of. There is a big high fence, and a fellow would not crawl through that, that I could see.

Cross-examination.

I live on Queen Anne Hill, and have lived in Seattle thirty-six years. Have been an engineer twenty-two years. Have been stationed at Argo Yards practically all the time. During all that time I have been operating on track 12. I operate all over the yard. This time I was operating at night time. You change off when the seniority comes to you. I worked there when Mr. Barr was yardmaster. We always got instructions to be careful, because they used that (No. 12) as a dump track. In yard service we move cars anywhere in the yard there, without knowing and seeing the end car. There is no path there (on No. 12). I have been all over the track; there is no path there at all. I should judge that the last box-car before we moved it on track 12 was about a car length from the switch. I got signals to shove it in. I get signals from the switchman to do my work. I do not re-

(Testimony of James A. Hendricks.)

call exactly where Mr. George was at the time the car was moved, but I saw him; I could see him plain. He was standing on the ground, not over a car length from the engine. The three men were not on the ground together, one of them was on the footboard making a coupling, and the other fellow was back by the car making a coupling. I think I was getting my signals from Mr. George. He was foreman of the switchmen and the one that gives the signals. None of the men were near the car that struck the boy. The boy was struck, I should judge, forty cars away from the engine. One man was between the engine and the car [110] on the footboard. The other man was making a coupling in back of the car. They could not see around the curve on track No. 12. The cars would be pretty well around the curve. There was no watchman or switchman on top of the box-cars as we went into this track; there never is. We never have a watchman or switchman on top of cars shoved into a track.

Redirect Examination.

There is no rule requiring a man in the yard there on top of the car. Track 12 is used very frequently. We might use it two or three times in fifteen minutes, and we might use it once in an hour. It is used a hundred times a day.

Recross-examination.

We might go in in fifteen minutes afterwards and pull the whole track out; you cannot tell. I was in

(Testimony of James A. Hendricks.)

there yesterday afternoon twice, and pulled out the whole track. There were fourteen cars in there yesterday. We would not go in there unless there are cars there. I would have nothing to go for. I have shoved cars in there and there would not be any on the track at all. When there are cuts in the train we always shove back easy and they make their own couplings. There is practically always cuts in the string of cars. In order to discover whether or not they are coupled, we will take a pull on them, and if they are all coming we take them out; if they don't all come, we go back and get the rest. I used track 12 at the time of this accident just as I have used it a thousand times.

Testimony of Joseph A. George, for Defendant.

My name is Joseph A. George; I testified yesterday for the plaintiff. At the time of the accident I was engine foreman [111] and am still engine foreman. I remember the day of the accident. That was my first move when I went to work about 4:00 o'clock, was to shove that car in on track 12. We were shoving in just one. We were doing it as we had done it on several other occasions. That is an every-day occurrence. There is no rule of the company requiring a man on the rear end in the yards. There are no crossings over track 12 between First Avenue and Argo Station. I have been working on track 12 ever since it was built. There was no occasion previous to this case of anyone being bumped into since the track was built.

(Testimony of Joseph A. George.)

Cross-examination.

I was on the ground when the engine pushed that car in there. One of the men was on the footboard, and the other made a coupling on the stock cars. We were within a car length of each other. There were fifty-seven cars on the track. The Coroner's inquest was not held on the path; it was held where the boy was hurt. The inquest was about half over when I got there. I don't know anything about a path there. I never got down there to see if there was any path, because there is a fence there. We did not kick those cars in.

Testimony of Peter J. McGraw, for Defendant.

I am the same man that testified yesterday. I am the Yardmaster at Argo. I was on duty on May 18th, 1922, at the time of the accident. The crew was pushing in some cars there to be cleaned. There is, to my knowledge, no track or pathway across track 12 between First Avenue and the roundhouse. I have been at the Argo Yards since 1909, since before track 12 was built, and I have been there ever since. I first learned of [112] the accident the next morning. I was down to the scene of the accident the next day with Mr. Anderson and the little boy, Charles Roman, brother of the boy that was injured. He indicated to us the place where the accident happened. Mr. Anderson and I asked him at that time why he did not come to the railroad men for help. He said he was afraid to go up that way because he had no business on the

(Testimony of Peter J. McGraw.)

track. He said he came in there to get some wood. We asked him why he did not go around by the roundhouse and go to the dump. He said that they won't let him in there that way. He said his mother and father sent him there. On that day the boy took us out to the track on the trail he had taken the day before. There was an old plank laying across the ditch; there was only one plank. The boy indicated to us the place where his brother was injured, about 15 feet north of path leading to track. There is no rule of the company requiring anyone at the back of these fifty-seven cars on that day. I know the rule of the company in that regard; it is Rule 103.

“Mr. JONES.—Is there any objection to reading that into the record, instead of putting the book into the record?

Mr. BROWN.—I object. * * *

The COURT.—Objection overruled.

Mr. JONES.—(Reading:) “Rule 103. Oregon Washington Railway & Navigation Company, in regard to handling cars on tracks.

When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the front of the leading car.” [113]

Cross-examination.

There was a path up to the ditch. There were no paths whatever across the track or on the other side of the track. No one came to get wood and scrap-iron at the dump over this path that I know

(Testimony of Peter J. McGraw.)

of. I testified before the coroner's jury. In testifying as to the trail, it was that trail that goes to the left of the dump since they put the fence up. I didn't state that they crossed the track. There is no footpath on the other side of track 12. I was referring to the footpath to the ditch; it follows on the left-hand side to the dump. The dump is on the other side of track 12, but they go up and go around. They go clear up by the bridge and around in there to the city dump. At the inquest they were talking about the path leading to the ditch; that path had been there quite awhile. I knew of the path that lead to the left. The man Anderson who was with me is the roundhouse foreman. We went there the next day with the little boy. It was just rumored that somebody got hurt. We had quite a time to find out. We went to the hospital. At last we found this boy at school. We went to the schoolhouse, got Charles Roman, and asked him to come along and show us where the boy got hurt. We went to the hospital first. We did not talk to Edgar Roman; the nurse was there. What I said at the investigation was true, unless they got that wrong. I was telling the truth before the coroner's inquest. We heard the statement that he made. We did not go there to get a statement; we went there to find out how the boy got hurt. Nobody knew; we could not find out anything at all. We did not know whether he got hurt by the Northern Pacific or the Great Northern. There were twenty tracks down there. I did not know where he lived.

(Testimony of Peter J. McGraw.)

As soon as we found out where he lived, we went there. I think it was after we went [114] to the hospital. You could go to the dump through the gate at the roundhouse and go right down there. There is a gate there. You could go in and go down the track. You can go down the track without going to the roundhouse.

Q. Didn't you make this statement, a juror asked you: 'Is there any signs along here where it says, "No trespassing"? and you said 'No.' 'You say the fence has been knocked down?

A. Yes sir, they threw dirt along here, and they knocked it over, kept throwing dirt over there.

Q. How long has this footpath been there?

A. I could not say, Doctor, but it has been quite a while.

Q. Is there any crossing there?

A. There is no crossing there, but that used to be an old trail across through there. Now they changed it and put it across here; they moved it up.' Did you testify to that?

A. That trail that goes to the left, to the dump, since they put the fence up.

Q. 'They come through this path and they cross the track,' and then you stated—

A. No, sir; I didn't state it, that they crossed the track, no, sir.

Q. 'How long has this footpath been there.' What footpath have you reference to, on which side of the track? A. On the left-hand side.

Q. Going up the track?

.(Testimony of Peter J. McGraw.)

A. No, sir; it goes to the dump.

Q. Which footpath do you have reference to; on this side of track 12, or on that side?

A. There is no footpath on the other side of track 12.

Q. Then you have reference to a footpath there, to this path that came to the plank?

A. Yes, sir; to the ditch.

Q. That is what you are speaking of?

A. Yes, sir; it follows on the left-hand side to the dump.

Q. You would have to cross the track, in order to get to the dump? A. No, sir.

Q. Which side of track 12 is the dump?

A. It is on the other side, but they go up and go around.

Q. Then they asked you, 'Is there any crossing there?'

A. There is no crossing there. That used to be an old trail across through there. Now they changed it and put it across here; they moved it up.

Q. Who put this path over here?

A. Why I suppose the people from the dump to 'pick up stuff.' Did you so testify?

A. If it is in there I did; yes, sir.

Q. Didn't you talk to him? A. No, sir.

Q. You didn't talk to him?

A. No, sir; the nurse was there.

Q. You went to the County Hospital. (Reading:) 'We went to the County Hospital and got the statement from Edgar Roman, and he told us that his

(Testimony of Peter J. McGraw.)

little brother was along with him at the time'; Did you make that statement before the coroner's jury? [115]

A. If it is there I did; yes, sir.

Q. If it is there that is true, is it? A. Yes, sir.

Q. And you are mistaken when you testify, 'We didn't interview him'?

A. The nurse—what does it say down there? Does it say about the nurse?

Q. Let's find out. You were asked by the coroner? Q. You discovered at 9:30 the next morning,

of what day? A. It would be the morning of the

19th. Q. The morning of the 19th, which was the

next day? A. Yes, sir. Q. You went to the

County Hospital? A. We went to the County

Hospital and got the statement from Edgar

Roman, and he told me that his little brother was

along with him at the time. Q. His little brother

George? A. He said that he and his brother was

down there, going over to the dump to get some

wood, and that they had a wheelbarrow trying to

push it across the track, and the cars moved, and

they said the wheel ran over on his legs, and then

fell back again. Is that correct? A. Yes, sir."

Redirect Examination.

The Romans live much nearer to the roundhouse, and it would be shorter and more convenient for them to go down the track by the roundhouse than it would to go around over this path.

(Testimony of Peter J. McGraw.)

Recross-examination.

One would be able to wheel a wheelbarrow down the track from the roundhouse. One could go along the middle of the track.

Testimony of Fred S. Anderson, for Defendant.

My name is Fred S. Anderson; I am mechanical foreman for the O.-W. R. & N. Company. I have worked for them three years last June, and was in their employ on the 19th of May, 1922. On May 19th I accompanied Mr. McGraw and Charles Roman along the path shown to us by Charles to track 12. Charles showed us where the accident happened. We inquired of him at that time why he did not come to the railroad men for help. He said he was afraid to go down there, because he did not know that he was allowed there, and he did not want anyone to know that his brother was injured. We asked him why he did not go down the track from the roundhouse rather than to go around on this trail. It would have been much closer to have gone by the roundhouse. He said he was not permitted to go through that way. On that morning there was one [116] plank across the ditch over the right of way.

Cross-examination.

He told me that he had used that path to gather wood from the dump. He did not mention other people using it, to my knowledge. It did not enter into my mind that other people were using it at all; I did not inquire as to that. I have been down

(Testimony of Fred S. Anderson.)

there three years and a half. I went over to the hospital. I got no statement from Edgar Roman. We did not talk to him on account of his serious condition. I asked him how he felt; that is about all. He said he met with an accident with the wheelbarrow; that is about all he could tell. He did not mention how it happened at all.

Testimony of C. P. Hatton, for Defendant.

My name is C. P. Hatton; I am employed as switchman for the O.-W. R. & N. Company in the Yargo Yards, and was working as such on the 18th of May, 1922. I went to work at four P. M. At about that time I was working on switch track 12. Shortly after we came to work, we had hold of—I don't recall—a matter of two or three cars, and we were going to shove them in on this No. 12 track. The cars were up very close to, if not, foul of No. 11 track, and this No. 12 track, at the time there were quite a number of cars on it, and we wanted to shove them down far enough to clear No. 11 track so as to go in there. We had cars to go in there and cars to get out, and I rode this lead car down that way that we had pushed up with the engine, made the couplings; and the foreman and assistant yardmaster on duty at the time gave the signal to take up the length of distance that they figured was room enough, that they needed to hold those cars. I coupled up and saw that the coupling was made. [117]

(Testimony of C. P. Hatton.)

Cross-examination.

I do not recall whether there were two or three cars attached to the engine. I recall the facts and circumstances because we talked about it the next day before we went to work. We just discussed this matter of what time we were in on this 12. We did not kick those cars in there. We could not kick them in because the cars were up too close. Those that were on the track were either afoul of 11 that they had to go in. It is not negligence for a car to be afoul of track 11.

Testimony of Fred W. Mallett, for Defendant.

My name is Fred W. Mallett; I am District Claim Agent for the Oregon and Washington Railway Company. On hearing of any accident it is my duty to get out and investigate the circumstances of the case. I heard the testimony of Mr. and Mrs. Roman. I talked with them a few days after this accident. It was about the 22d of May, previous to the boy's death. On that day they both admitted to me that they knew that the boys were trespassers on the road at the time of the accident. They both said at that time that they knew it was their own fault in allowing the boys to go upon the road.

Cross-examination.

I found both Mr. and Mrs. Roman at the hospital. I did not know that the boy was dying. They were not in the room with the boy at the time I saw them. The man seemed a little more affected than the

(Testimony of Fred W. Mallett.)

mother. The mother very willingly and voluntarily gave me the information. I told them who I was. I told them I was claim agent for the Oregon & Washington Railway. I did not tell them the purpose of my visit. I did not tell them [118] that anything they said that was against them I would testify to. I have been an investigator for thirteen years.

Testimony closed.

“Mr. JONES.—I have a motion, if your Honor please.

The COURT.—The jury will retire from the room, and remain on call.

(Jury leaves courtroom.)

Mr. JONES.—If your Honor please, in order to preserve the record, I want to make a motion at this time.

Comes now the defendant and moves the Court for a directed verdict for the defendant in the two cases pending, on the ground, and for the reason that the evidence in these cases does not show any negligence on the part of defendant sufficient to entitle plaintiffs to recover herein, and that the evidence establishes that the decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions, which directly contributed thereto, and negligent acts and omissions of plaintiffs, the father and mother, which directly contributed thereto, the father, as administrator in one

suit, and the father and mother in their personal capacity in the other suit.

(Arguments.)

The COURT.—The motion is denied. But I want to call your attention to the fact that since the amendment, the amended complaint in 7018, that the paragraphs were renumbered, and allow your answer to stand as made by the original complaint, and applying it to the amended complaint you admit in paragraph V. Paragraph V of the [119] amended complaint is the allegation of the path. Of course paragraph V of the original complaint is now paragraph IV, as I understand it.

Mr. JONES.—I move the Court that the record show that the answer of defendant denies paragraph V of the complaint.

The COURT.—The record may show.

Mr. JONES.—Let the record show that an exception be allowed defendant to the Court's ruling denying the motion.

The COURT.—Exception allowed.

Instructions of Court to the Jury.

“The COURT.—Gentlemen: You have listened to the evidence and the arguments in the case; all that remains to be done before you retire to make up your verdict, is for the Court to instruct you on the law.

As you have gathered from the beginning in this case, there are two cases being tried to one jury. That may seem, under the evidence in these cases, difficult for you to understand, and a word of ex-

planation by the Court is not out of place. There is, in common law, no right to recover in damages on account of anyone's death. There is no right to recover unless the statute gives it; and there are two statutes of the State of Washington that have allowed recovery where the facts warrant it, to parents where a child has been killed. One provides that the administrator of the deceased child, where there are parents living dependent on the child for support, that an action may be maintained by the administrator to recover such damages as are just under all the circumstances of the case. [120]

There is another statute that provides that if a child dies on account of his injuries, and has suffered pain, that that right of action does not end with his death, but that it lives, the parents who are dependent on him for support, those parents may sue and recover what he could have recovered under that right of action. You will, of course, understand that so far as that pain and suffering is concerned, that it is the pain and suffering that the deceased endured between the time of his injuries and his death. Since in the one case the administrator is the party to sue, and in the other case the parents are the parties only who can sue, that is the occasion for there being two lawsuits here instead of one. Although in the one case it comes back to the support of which the parents have been deprived by his death, and in the other case it goes to the compensation, if any to be rendered, on ac-

count of pain and suffering that the deceased had endured before his death.

The plaintiffs' complaint in each action in this case alleges, that there was a footpath or way or road across the tracks of the defendant company in the south part of the city; that it had long been used, that the defendant knew about it, and that this deceased boy, in crossing that railroad, over that footpath, was injured and subsequently died from the injuries he received. That the defendant was negligent in that there was no one on or about the cars that ran against him, upon him, and injured him; and that no alarm was given, or warning that the cars were moving; and then alleges the damages on account of the injury and death.

Defendant comes into court and denies that there was any path there, and denies that it had any knowledge of any [121] path or road, and denies that it was negligent in any way; and then sets up as an affirmative defense in each case, that there was no path, and that the deceased was a trespasser, and had no right to be at the point where he was injured, had no right to be there. It further sets up that his injuries were occasioned by his own contributory negligence, and that the parents themselves, for whose benefit these suits are brought, were guilty of contributory negligence in allowing the boy to be there.

The plaintiffs then, by their reply, deny these affirmative defenses, which the defendant has set up; that is, they deny that the deceased was wrongfully where he was, and deny that he was a trespasser,

deny that he himself was negligent, and deny that the parents were negligent. These are the issues that you are called upon to try.

The first is the matter of this path that has been testified concerning. It is possible that if there has been notorious, hostile, adverse and continuous use of a pathway or road, that a right may be built up upon the part of the public, that is, an adverse right. But, as I understand the evidence in this case, and the arguments of counsel, that is not the contention of the plaintiffs. The contention of the plaintiffs is, that the deceased was what is known in law as a licensee; that is, that the railroad, by its conduct, had given permission to the deceased as one of the public, to use this pathway until such time as the railroad set its foot down and put a stop to it. It is the law that if a railroad or any other person who owns land, with knowledge that it is being used for a certain purpose, say for a foot-path, permits it impliedly or expressly,—permits [122] the continued use of it for that purpose, that one so using it is not a trespasser.

Regarding the railroad's duty to a trespasser, the Court instructs you, that the railroad in the operation of its trains, has, in the absence of knowledge that a particular individual is in danger from the operation of its trains, a right to operate them on the assumption that other people are obeying the law, that no one is trespassing on its tracks. Of course, if the man operating the train see the person on the track, this rule does not apply; but, in the absence of knowledge that any one is in danger

on the tracks, they have a right to run their trains, taking for granted that no one is trespassing in a place of danger. So far as a trespasser is concerned, a railroad company in operating its trains, would only be liable if it were grossly negligent. A person is grossly negligent when he fails to exercise even slight care.

The rule where a person is a licensee, where there is an implied consent on the part of the defendant railway company to the deceased, as a member of the public, he might use this footpath as a footpath until the railroad company saw fit to put a stop to it; so far as the defendant company's duty to such person is concerned, the law requires of the railroad company that it exercise ordinary care.

Ordinary care is the care that an ordinary careful and prudent person would exercise under like circumstances, from time to time, and should always be proportioned to the peril and danger reasonably to be apprehended from the want of proper prudence. [123]

Now, the peril and danger reasonably to be apprehended from a want of proper prudence,—one of the circumstances that would be taken into account in determining what ordinary care would be, would be the extent to which such a footpath was used, if at all, and, if the defendant company had knowledge of its use.

Regarding the burden of showing, by a fair preponderance of the evidence, the disputed allegations in the complaint, rests upon the plaintiffs; that is, they must show by a fair preponderance of the evi-

dence, unless the defendant was guilty of gross negligence, as I have defined it to you,—the plaintiffs would have to show by a fair preponderance of the evidence,—and this extends to the use,—of the existence and use of the footpath so used by knowledge of the defendant. They would have to show by a fair preponderance of the evidence the negligence in at least one of the particulars which is alleged in the complaint; that is, the negligence of the defendant; they would have to establish by the evidence the amount of damage owing to the injury; they would have to show that the negligence of the defendant was the proximate cause of the deceased's injury and damage.

Regarding these defenses that have been interposed, the affirmative defenses, that the deceased himself was guilty of contributory negligence, and that the parents were guilty of contributory negligence, the burden of establishing by a fair preponderance of the evidence those defenses, rests upon the defendant.

The deceased was bound to exercise ordinary [124] care for his own safety in crossing the tracks of the defendant company. In determining whether he exercised ordinary care you will understand that means the ordinary care to be reasonably expected from a boy of his age, experience and understanding, under the same circumstances. If he failed to exercise ordinary care for his own safety, and that failure to exercise ordinary care on his part, was the direct, proximate cause of his

injury and damage, and without that failure on his part to exercise ordinary care, he would not have been injured, then the plaintiffs in neither case can recover, and your verdict would be for the defendant. Likewise, the deceased's parents, in their control of the deceased boy, they were bound to exercise ordinary care for his safety; that is, they were bound to exercise that degree of care and prudence that parents would ordinarily exercise in the control and direction of a child of the age, understanding and experience of the deceased. If they failed to exercise that degree of care for his control and direction, and that failure on their part to exercise that degree of care was the proximate cause of his injuries and death, then there can be no recovery in either case; that is, if the parents, or either of them, failed to exercise that degree of care, there can be no recovery in either action.

The Court has used the expression 'proximate cause.' Proximate cause is that cause that directly produces a result; the moving efficient cause, that cause, which moving in a continuous sequence uninterrupted by any new and efficient cause produces a result.

I have been asked to give certain written instructions, and I may have neglected to cover the ground [125] covered by the written instructions, for that reason I will read some of them. Do not take for granted where there is a repetition in the written instructions covering the same points, that I have covered in the oral instructions, that the Court deems it of any more importance than the other

instructions where there is no such repetition. You will understand that all the instructions that I am giving you apply to both cases, unless I have particularly pointed out where an instruction applies to only one of these cases.

The Court instructs the jury that, if it has been shown by the evidence that the plaintiffs' son, Edgar Roman, was guilty of any act of negligence which directly contributed to his injury, that is, was guilty of want of ordinary care,—that is, the ordinary care of a boy of his age, intelligence and experience under the same circumstances, whether it was because of some act that such an ordinarily careful and prudent boy would not have done or the omission to do that which an ordinarily careful and prudent boy would have done, under the circumstances, and such want of ordinary care contributed to the accident, and without it the accident would not have occurred, then you should go no further, and fix the amount of recovery. The boy's contributory negligence in such case defeats recovery, and your verdict must be for the defendant, even though you find the defendant to have been also guilty of negligence.

The Court instructs you that the defendant had the unobstructed use of its tracks in its yard in the city of Seattle for the passage of its switching engines and cars, and for the storage of same; that unless you believe from the evidence that there had prior to the time of the accident, [126] been such common, notorious and habitual use of its yards at the place in said yards where the accident oc-

curred, as a path or footway by the public, that the defendant would, in the exercise of ordinary care have had knowledge thereof, then there was no obligation upon the defendant as to the decedent to keep a lookout for him, to discover his peril, if he was in a perilous position.

The Court instructs you that, it is not to be inferred from the slight circumstances that a railway company has granted to the public the joint use of its switch track. The switch track is constructed primarily for the purpose of storing and moving cars thereon. To permit its use as a footpath greatly hampers the railroad company in moving its cars thereon, and it is not the policy of the law to encourage such use, and unless a clear right to be upon the switch track at a given place is shown, a footman thereon is to be regarded as a trespasser.

The Court instructs you, that there is no legal obligation imposed upon the defendant to fence its switch yard in the city of Seattle, and it is not negligence upon the part of the defendant in not fencing, where no duty is imposed upon the defendant to do so.

The Court instructs you, that sympathy has no place in the trial of a lawsuit; and in making up your minds as to what your verdict shall be, don't permit that element to enter into your deliberations whatsoever.

Logically, in taking up the issues that have been submitted to you for determination, you would first inquire and determine whether it has been shown

by a fair preponderance of the evidence that the deceased, was himself [127] guilty of contributory negligence, as I have defined that matter to you; and, if you find that the deceased was guilty of contributory negligence, and that that was the proximate cause of his injury and death, it would be your duty to return a verdict for the defendant, and it would not be necessary for you to inquire concerning the other issues. However, if you find that there is no fair preponderance of the evidence that the deceased was guilty of contributory negligence, then you would determine whether it has been shown by a fair preponderance of the evidence, that either of the deceased's parents had been guilty of contributory negligence, that is, negligence which had directly contributed to his injury and death. If you find that there was any such fair preponderance of the evidence, you would stop right there, and return a verdict for the defendant; because it would not be necessary for you to determine the other issues in the case. If there has been no fair preponderance of the evidence shown as to contributory negligence, either on the part of the deceased, or on the part of either of his parents, you would then take up the question and determine whether the defendant had, by a fair preponderance of the evidence, been shown to have been negligent in any of the particulars of which plaintiffs had complained in either action. If you find that there is a fair preponderance of the evidence that the defendant was guilty of such negligence, you would proceed; but if there has been no fair preponder-

ance of the evidence that the defendant company was guilty of such negligence you would stop there, and return a verdict for the defendant company. If it has been shown by a fair preponderance of the evidence that it was guilty of some [128] act of negligence of which complaint is made, you would then take up the question of whether that was the proximate cause of deceased's injury and death. If you find by a fair preponderance of the evidence that it was, you would then come to the last step in these two cases, which would be to fix the amount of recovery.

Now, in the one case, that is, where the administrator sues, the Court instructs the jury, if you find for the plaintiff, you will find for him for such sum of money if any, as you may find and believe from the evidence, under all the circumstances of the case to be just, bearing in mind that it is the pecuniary value—the value in money, of all benefits, which it is reasonably certain his parents would have received had he not been killed. That is the measure and the amount of recovery in that case.

In the other case where the parents sue on account of pain and suffering of the deceased, the Court instructs you, that if you find for the plaintiffs, you will assess the damages at whatever sum you may find from the testimony to be a fair and reasonable compensation for the pain and suffering endured by Edgar Roman, because of the accident, between the time of the accident and the time of his death. In this action you can award nothing for his death; you can award

nothing for the losses caused to the parents by reason of his death; you can award nothing by way of punishment of the defendant because of its negligence, if you find it was negligent.

In this case, as in other cases, the questions of fact are submitted to the jury for their determination; and you are the sole and exclusive judges of every fact in the [129] case, and the weight of the evidence, and the credibility of the witnesses.

Is there anything further, Gentlemen?

* * * * *

Mr. JONES.—There was an instruction submitted on the deviation from the footpath, which I think was the law.”

The instruction referred to is as follows:

“The Court instructs you that if you find from the evidence that a footpath across defendant’s track No. 12 was acquired by user and that a person traveling on same across said track was not a trespasser, you are further instructed that any material deviation from said footpath in crossing said track would constitute the party making such deviation in crossing said track a trespasser thereon.”

“The COURT.—If a man is going along an unobstructed road, and climbs over a fence into another man’s field, he would be a trespasser, all right, but I do not think that requested instruction is applicable to this case.

Mr. JONES.—I would like the record to show an exception.

The COURT.—Exception allowed.

* * * * *

Mr. JONES.—If the Court please, I do not know that the jury understands that during the progress of the trial, the plaintiffs filed amended complaints, and that there has been no answers filed by the defendant to said complaints, but that all the material allegations of the complaints are denied.

The COURT.—(To the Jury.) The jury will so understand. And the Court in the instructions told you that the existence of a footpath was denied, knowledge on the part of [130] defendant that there was such footpath was denied, and negligence on the part of defendant was denied. You will consider all the material allegations, not admitted, as denied. You may retire.”

The jury then retired, and after deliberation returned into court with a verdict in favor of the plaintiff in cause No. 7019 for damages in the sum of One Thousand Dollars (\$1,000), and a verdict in favor of the plaintiffs in cause No. 7018 for damages in the sum of Four Thousand Dollars (\$4,000), said verdicts being returned on the 15th day of December, 1922.

And now in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in both cases, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Defendant. [131]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Order Settling Bill of Exceptions.

United States of America,
Western District of Washington,
Northern Division,—ss.

On this 19th day of March, 1923, the above consolidated causes coming on to be heard upon the application of the defendant, Oregon-Washington Railroad & Navigation Company, to settle a bill of exceptions in said causes, the defendant Oregon-

Washington Railroad & Navigation Company appearing by its attorneys, Bogle, Merritt & Bogle and E. I. Jones, and the plaintiffs appearing by their attorneys, Fred C. Brown and J. Stanley Tyrrell; and it appearing to the Court that the bill of exceptions was duly served on the attorneys for the plaintiffs within the time provided by law, and that amendments thereto have been accepted and incorporated therein, and all the parties consenting to the signing and settling of the same, and that [132] the time for settling said bill of exceptions has not expired, the same having been extended from time to time by stipulation and order of the Court for the reason that more time was required; and it further appearing to the Court that the bill of exceptions contains all the material facts occurring in the trial of said causes together with the exceptions thereto, and all the material matters and things occurring upon the trial except the exhibits introduced in evidence, which are hereby made a part of the bill of exceptions, and the Clerk of the Court is hereby ordered and instructed to properly mark and identify such exhibits and attach the same thereto, or in case it is inconvenient or not practicable to attach said exhibits, to properly identify them in the causes and to forward them unattached, as part of the bill of exceptions;

Thereupon, on motion of the defendant, Oregon-Washington Railroad & Navigation Company, it is hereby ORDERED that said proposed bill of exceptions be and it is hereby settled as the true

bill of exceptions in said causes, and the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said causes, as a true, full and correct bill of exceptions, and the Clerk is hereby ordered to file the same as the record in said causes, and to transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,

Judge.

Copy of attached bill of exceptions received and due service thereof admitted upon January 22, 1923.

FRED C. BROWN and

J. STANLEY TYRRELL,

Attorneys for Plaintiffs. [133]

[Indorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Feb. 16, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 27, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [134]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Stipulation Consolidating Causes for Appeal.

IT IS HEREBY STIPULATED AND
AGREED by and between the parties to the above-
entitled actions, through their respective attorneys,
Fred C. Brown and J. Stanley Tyrrell, attorneys
for the plaintiff, and Bogle, Merritt & Bogle and
E. I. Jones, attorneys for the defendant, that said
actions shall be and remain consolidated for all

purposes of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, just as they were consolidated for the purposes of trial in the above-entitled court, and that all assignments of error shall apply to each action, except as therein expressly stated as applying to only one of said actions.

Dated at Seattle, Washington, this 13th day of June, 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff. [135]
BOGLE, MERRITT & BOGLE,
E. I. JONES,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [136]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable EDWARD E. CUSHMAN,
Judge of the District Court aforesaid:

Now comes Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled consolidated actions, by its attorneys, and respectfully shows that on the 15th day of December, A. D. 1922, a jury duly im-

panelled found a verdict of \$4,000 in cause No. 7018, and a verdict of \$1,000 in cause No. 7019, against your petitioner and in favor of the plaintiff in said respective causes, and upon said verdicts a final judgment was entered in cause No. 7018 on the 30th day of December, A. D. 1922, and in cause No. 7019 on the 20th day of February, A. D. 1923, against your petitioner, Oregon-Washington [137] Railroad & Navigation Company, defendant herein.

Your petitioner, feeling itself aggrieved by the said verdicts and judgments entered thereon as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, California, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

BOGLE, MERRITT & BOGLE,

E. I. JONES,

Attorneys for Petitioner in Error.

Copy of attached petition for writ of error received and due service thereof admitted upon 13 June, 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff-Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [138]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Assignments of Error.

Now comes the Oregon-Washington Railroad & Navigation Company, a corporation, defendant, plaintiff in error in the above-numbered and entitled causes, and in connection with its petition for a writ of error in said causes, assigns the following errors which plaintiff in error avers occurred on the trial thereof and on which it relies to reverse the judgments entered herein, as appears of record:

I.

The Court erred in overruling the demurrers to the complaints filed in these causes, and each of them, for the reason that the plaintiff in each action had no capacity to sue, that there was a defect in the parties plaintiff, and for the further reason that the complaint in each cause did not state a [139] cause of action against the defendant.

II.

The Court erred in permitting the witness W. H.

Barr, for plaintiff, to answer the following question propounded by plaintiff's attorney to him: "Did you have any knowledge that the public was using the path?" and in not sustaining the objection of the defendant thereto; said question and the testimony sought to be elicited was immaterial, for the reason that the witness—as shown by his testimony—had not worked for the defendant for four or five years previous to the accident upon which the said actions are based. The answer of the witness to the question above was "Yes, sir."

III.

The Court erred in not granting the motion of the defendant for a nonsuit for the following reasons:

(a) That there was a material variance between the complaints and the proof thereof, in that all the complaints alleged that at the time of the accident, "there were standing on said track No. 12 and commencing about 4 feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation," when the evidence of the plaintiff conclusively showed that the last car in the string extended over said alleged path for a distance of almost its entire length.

(b) That the testimony did not show that said defendant company was guilty of any negligence sufficient to entitle the plaintiff to recover.

(c) That the plaintiff's evidence established that decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions,

which directly contributed thereto, [140] in attempting to cross the defendant's switch-track at the place where he was injured, there being on the track a car directly in front of him, so that he was obliged to walk westward almost the entire length of the car, and in then attempting to cross immediately at the very end of the car.

(d) That the plaintiff's evidence further established negligence on the part of the plaintiff and his wife, the parents of the decedent, which directly contributed to the injuries, in that when they accompanied the decedent and his brothers to the place of the accident on previous occasions, they ordered and permitted the decedent and the others to climb over and under the couplings between the cars, and on the occasion of the accident, they allowed the decedent to cross over the track at the place of the accident unaccompanied by them, or either of them, or at all.

IV.

The Court erred in not granting defendant's motion for a directed verdict:

(a) For the same reasons given in subdivision (a) of Assignment No. III.

(b) For the reason that the evidence was insufficient to justify the verdict against defendant.

(c) That the evidence did not show that the said defendant was guilty of any negligence sufficient to entitle the plaintiff to recover.

(d) That the evidence established that the decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions, which

directly contributed thereto, in attempting to cross the defendant's switch-track at the place where he was injured within the defendant's switch-yards, there [141] being at that time on said track a car directly in front of him, so that he was obliged to walk westward almost the entire length of said car, and in then attempting to cross immediately at the very end of said car, said car being at that time and place one of a long string of cars attached together, the eastward end not being visible to the decedent and his brother.

(e) The evidence further established without question negligence on the part of the plaintiff and his wife, the parents of the decedent, consequent beneficiaries under these actions, which negligence directly contributed to the injuries, in that when they accompanied the decedent and his brothers to the place of the accident on previous occasions, they ordered and permitted said boys to climb over and to crawl under the couplings between the cars, and on the occasion of the accident, they allowed the decedent and brother to go upon the switch-track unaccompanied by them, or either of them, or at all.

V.

The Court erred in refusing to give the instruction requested by the defendant which reads as follows:

“The Court instructs you that if you find from the evidence that a footpath across defendant's track No. 12 was acquired by user and that a person traveling on same across said

track was not a trespasser, you are further instructed that any material deviation from said footpath in crossing said track would constitute the party making such deviation in crossing said track a trespasser thereon”;

for the reason that such instruction was in accordance with the law and under the facts of the cases, and for the reason that the decedent departed so far from the alleged path as to make it a question for the jury to determine whether or not his status had been altered from a licensee to a trespasser. [142]

VI.

The Court erred in rendering and entering any judgment in favor of plaintiff and against the defendant in said causes, for the following reasons:

(a) That the plaintiff in said causes had no capacity to sue.

(b) That the filing of the second amended complaint in cause No. 7018, did not aid the verdict and judgment theretofore rendered and entered.

(c) That none of the complaints in said causes stated facts sufficient to entitle the plaintiff, or plaintiffs, to any judgment against the defendant.

(d) That the alleged cause of action in the amended complaint in cause No. 7018, is the same as set forth in the amended complaint in cause No. 7019.

WHEREFORE, said Oregon-Washington Railroad & Navigation Company, defendant, plaintiff in error herein, prays that the judgment of this Court in the above-entitled causes be reversed,

with directions to said District Court to enter judgment herein against the plaintiff, or plaintiffs, and in favor of the defendant.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Defendant-Plaintiff in Error.

Copy of attached assignments of error received and due service thereof admitted upon June 13, 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff-Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [143]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That Oregon-Washington Railroad & Navigation
Company, a corporation, as principal, and National
Surety Company, a corporation, as surety, are held
and firmly bound unto James Roman, administra-
tor of the estate of Edgar Roman, deceased, the
plaintiff herein, in the full and just sum of six
thousand dollars (\$6,000.00), to be paid to the said
plaintiff, for which payment, well and truly to be
made, we bind ourselves, our successors and as-
signs, jointly and severally, firmly by these pres-
ents.

Sealed with our seals and dated this 13th day of
June, 1923. [144]

WHEREAS, the above-named Oregon-Washing-
ton Railroad & Navigation Company, a corpora-
tion, has prosecuted a writ of error to reverse the
judgments of said District Court rendered on the
21st day of December, 1922, and on the 20th day of

February, 1923, in favor of said James Roman, administrator of the estate of Edgar Roman, deceased, and against said Oregon-Washington Railroad & Navigation Company, for the recovery of Four Thousand Dollars (\$4,000.00) and One Thousand Dollars (\$1,000.00);

NOW, THEREFORE, the condition of this obligation is such that if the above-named Oregon-Washington Railroad & Navigation Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said appeal good, this obligation shall be void; otherwise same shall remain in full force and virtue.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY,

By W. H. BOGLE,
Its Agent and Attorney,
Principal.

NATIONAL SURETY COMPANY,

By C. B. WHITE.

[Seal]

Attest: J. GRANT,
Res. Ass. Sec.

The above bond is hereby approved as to sufficiency and form this 13th day of June, 1923.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [145]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of Bogle, Merritt & Bogle and E. I.
Jones, attorneys for the defendant, plaintiff in
error, and upon filing the petition for writ of error
and assignments of error,—

IT IS ORDERED that the appeal by writ of
error be and the same hereby is allowed by this

Court, and the clerk is directed to issue a writ of error in accordance with the usual rules and practice of the Court, and that said Oregon-Washington Railroad & Navigation Company, said plaintiff in error, be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, judgments heretofore entered herein, and that the amount of the bond on said [146] writ of error be and hereby is fixed at Six Thousand Dollars (\$6,000.00).

Dated at Seattle, Washington, this 13th day of June, 1923.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [147]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Order Directing Forwarding of Original Exhibits.

On motion of Oregon-Washington Railroad & Navigation Company, a corporation, defendant herein (plaintiff in error) for an order requiring and directing the Clerk of this court to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, all of the exhibits admitted in evidence at the trial of the above-entitled causes, as a part of the return of said Clerk to the writ of error heretofore issued herein, it appearing to the satisfaction of the Court that said original exhibits should be returned to said Court of Appeals, and that said motion should be granted;

Now, therefore, it is HEREBY ORDERED that the Clerk of this court be, and he is hereby, authorized and directed to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit [148] all of the exhibits admitted in evidence at the trial of the above-entitled cause, as a part of the return to the writ of error heretofore

issued herein, as by law and the rules of court provided.

Dated June 22d, 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [149]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

100 James Roman 100

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

YOU WILL PLEASE prepare a transcript of record in the above-entitled consolidated causes, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file; transcript to be prepared pursuant to the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and to be transmitted to the Clerk of said court at San Francisco, California, forthwith: [150]

1. Complaints.
2. Demurrers.
3. Order overruling demurrers and exceptions thereto (Journal, October 16, 1922).
4. Answers.
5. Replies.

6. Amended complaints.
7. Verdicts.
8. Judgments.
9. Second amended complaints.
10. Answers to second amended complaints.
11. All orders extending time for filing bill of exceptions.
12. Bill of exceptions.
13. Stipulation consolidating actions for appeal.
14. Order settling bill of exceptions.
15. Petition for writ of error.
16. Assignments of error.
17. Order allowing writ of error.
18. Writ of error.
19. Bond.
20. Citation.
21. All of the exhibits admitted in evidence at the trial of the above-entitled cases.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Defendant-Plaintiff in Error.

We waive the provisions of the Act approved February 13, 1911, and ask that you forward type-written transcript to the Circuit Court of Appeals for printing, as provided under Rule 105 of this Court.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Defendant-Plaintiff in Error.

Copy of attached praecipe for transcript received
and due service thereof admitted upon 13 June,
1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff-Defendant in Error.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Jun. 13, 1923. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [151]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 151, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing consolidated causes, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and [152] that the same constitute the record on return to writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges, incurred and paid in my office on behalf of the plaintiff in error for making record, certificate of return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 347 folios at 15¢.....	\$ 52.05
Certificate of Clerk to transcript of rec- ord, 4 folios at 15¢ .....	.60
Seal to said certificate .....	.20
Certificate of Clerk to original exhibits, 3 folios at 15¢ .....	.45
Seal to said certificate .....	.20

I hereby certify that the above costs for prepar-
ing and certifying record, amounting to \$53.50, has
been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and here-
with transmit the original writ of error and the
original citation issued in these consolidated causes.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed the seal of said District Court,
at Seattle, in said District, this 28th day of June,
1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western Dis-
trict of Washington. [153]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgments of the pleas

which are in the said District Court before you between James Roman, administrator of the estate of Edgar Roman, deceased, plaintiff, defendant in error, and Oregon-Washington Railroad & Navigation Company, a corporation, defendant, plaintiff in error, a manifest error has happened to the damage of Oregon-Washington Railroad & Navigation Company, plaintiff in error, as by said complaints appear, and we being willing that error, if any hath [154] been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgments be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States this the 13th day of June, A. D. 1923.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the
Western District of Washington, Northern
Division.

Allowed this the 13th day of June, A. D. 1923.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the
Western District of Washington, Northern
Division. [155]

Copy of attached writ of error received and due
service thereof admitted upon June 13, 1923.

FRED C. BROWN,

J. STANLEY TYRRELL,

Attorneys for Plaintiff-Defendant in Error.

Filed in the United States District Court, West-
ern District of Washington, Northern Division.
Jun. 13, 1923. F. M. Harshberger, Clerk. By
S. E. Leitch, Deputy. [155½]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America: To the Plaintiff, James
Roman, Administrator of the Estate of Edgar
Roman, Deceased, and to His Attorneys, Fred
C. Brown and J. Stanley Tyrrell, GREETING:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear at the United States Cir-
cuit Court of Appeals for the Ninth Circuit, within
thirty (30) days from the date hereof, pursuant
to a writ of error filed in the Clerk's office of the
United States District Court for the Western Dis-
trict of Washington, Northern Division, wherein
the Oregon-Washington Railroad & Navigation
Company, a corporation, is the plaintiff in error,
and you are defendant in error, and show cause,
if any there be, why the judgments rendered
against the said plaintiff in error, as in said writ of
error mentioned, should not be corrected, and
[156] speedy justice should not be done to the
parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, Northern Division.

Dated this 13th day of June, A. D. 1923.

EDWARD E. CUSHMAN,
Judge. [157]

Copy of attached citation received and due service thereof admitted upon June 13, 1923.

FRED C. BROWN,
J. STANLEY TYRRELL,
Attorneys for Plaintiff-Defendant in Error.

Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 4049. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. James Roman, Administrator of the Estate of Edgar Roman, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 4049

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,
Plaintiff in Error
vs.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF IN ERROR

W. H. BOGLE	F. T. MERRITT
LAWRENCE BOGLE	LANE SUMMERS
E. I. JONES	

ATTORNEYS FOR PLAINTIFFS IN ERROR

609-16 CENTRAL BUILDING, SEATTLE, WASHINGTON

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4049

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error

vs.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This cause comes here on a writ of error sued out by the defendant below in two consolidated causes brought by the plaintiff below, as administrator of the estate of Edgar Roman, deceased, son

of said plaintiff, to reverse the judgments rendered against defendant below for the sums of four thousand dollars in one cause, and one thousand dollars in the other cause, in two actions at law, for the recovery of damages for the death of said Edgar Roman alleged to have been caused by reason of the negligence of the defendant. For convenience in this brief the parties will be referred to as designated in the court below.

There is practically no dispute as to the material facts in this case. The place where the accident happened was in the switch yard of the defendant near Argo station in the City of Seattle. The particular track upon which the accident occurred was track No. 12, which at that time and at all times since its construction was used extensively by the defendant for the storage of cars and for cleaning out same. (R. p. 113.) The nearest public crossing of said tracks is First avenue, about a city block west of the place of the accident where the street crosses the track in question and the yard of the defendant by an overhead trestle. Within the railroad yard and to the north of said track No. 12 is a portion of a dump pile created by the city in dumping refuse on the low land at said place. To the south of said track No. 12 at

the place in question is a large open field over which there are many paths, one of which runs to the railroad right of way in the vicinity of the accident. It is the contention of the plaintiff, testified to by several witnesses, that the last-named path had existed there for many years, and had been used quite extensively by various people living south of the track as a convenient passage to the dump pile. There is, however, no testimony—with the exception of that of one William Barr, who had not worked for the defendant for four or five years previous to the accident—that the defendant, its agents or employees, knew of the existence of the path or of the custom of people using the same. There is no contention whatever on the part of the plaintiff that there was any invitation, express or implied, held out by the defendant to anyone using the path, and the evidence showed beyond any question of a doubt that all used it for their own personal convenience.

At the time of and for some time prior to the accident, the plaintiff, together with his wife and seven children, resided about three-quarters of a mile (R. p. 85) south of the place of the accident, but only three blocks from the defendant's tracks and roundhouse. (R. p. 87.) For about

a year previous to the accident, plaintiff, his wife and his two boys—Edgar, deceased, aged twelve years, and Charles, aged nine years—had been using the path in going over to the dump pile to get wood for fuel. (R. p. 88.) The plaintiff testified that he went there first and then showed the boys where the wood was located, after which time the boys hauled most of the wood under his direction. Many times the mother accompanied the boys. (R. p. 108.) The father's testimony was to the effect that when their passage over the track was barred by cars, if it was inconvenient to walk to the end of same, he and the boys crawled over the couplings or drawheads between the cars. (R. p. 87.) The mother's testimony was almost identical with that of the father's except that she said that she and the boys sometimes crawled underneath the couplings between the cars. (R. p. 107.)

On the afternoon of May 19, 1922, the two boys, Edgar and Charles, went to the track with a wheelbarrow to get wood. When they reached the track there was a string of cars on the same, the westerly end of which extended for almost a car length across the place where the path was alleged to intersect the track, and the easterly end of which

could not be seen, as there were fifty-seven cars in the string, making a line over one-half mile in length.

The boys, with their wheelbarrow, went westerly along the track until they reached the very end of the last car, the one which barred their way, then attempted to cross the track, with Edgar between the handles pushing the wheelbarrow, and Charles at the wheel, lifting or rolling it over the rail. They succeeded in getting it over the first rail, and as they were endeavoring to get it over the second, with Edgar between the handles and standing right up against the rear of the car, an engine at the easterly end of the cars shoved them with sufficient force, to close one or two gaps in the string so that they could get another car or two on the track, with the result that the rear car moved back about two feet (R. p. 94), knocking Edgar down, the wheels running upon his legs and then off again. One leg was so badly injured it was necessary to amputate the same, with the result that the boy died on May 22, 1922.

There are three complaints on file in each case. (R. pp. 2, 7, 25, 30, 35, 41.) After the first complaints were filed and during the trial of the causes, the trial court called the attention of the

attorneys for the plaintiff to the fact that the plaintiff in each action had no capacity to sue. Counsel for plaintiff then filed amended complaints, changing parties plaintiff in each suit. (R. pp. 77, 78.)

After the cases were tried and the verdicts entered, and after judgment was entered in one case, counsel for plaintiff filed second amended complaints, making the administrator the party plaintiff in each action.

The question involved in this statement of facts and presented here by the assignments of error, together with the manner in which these questions are raised on the record, are as follows:

I

Defendant will contend that no negligence is shown, either as alleged or otherwise, on the part of the defendant, and therefore there could be no recovery in these cases.

This question is raised upon the record by assignment No. III (R. pp. 158, 159, 110) and assignment No. IV. (R. pp. 159, 160, 135, 136.)

II

That the contributory negligence of the decedent and of his parents was the proximate cause of the injuries which the decedent received, and therefore there could be no recovery in these cases.

This question is raised upon the record by assignment No. III (R. pp. 158, 159, 110), and assignment No. IV. (R. pp. 159, 160, 135, 136.)

III

That the trial court committed prejudicial error in permitting the witness W. H. Barr to testify that he knew the public was crossing the track near the point of injury.

This question is raised on the record by assignment No. II. (R. pp. 157, 158, 97.)

IV

That the trial court committed prejudicial error in refusing to give the instruction requested by the defendant as to the deviation from the alleged foot-path in crossing the switch track.

This question is raised upon the record by assignment No. V. (R. pp. 160, 161, 147, 148.)

V

That the trial court erred in rendering and entering judgments in said actions, for the reason that all of the complaints in said action were fatally defective.

This question is raised upon the record by assignment No. VI. (R. pp. 161, 2 to 11 inclusive, 25 to 45 inclusive.)



SPECIFICATIONS OF ERROR RELIED
UPON

I

The court erred in permitting the witness W. H. Barr, for plaintiff, to answer the following question propounded by plaintiff's attorney to him: "Did you have any knowledge that the public was using the path," and in not sustaining the objection of the defendant thereto; said question and the testimony sought to be elicited was immaterial, for the reason that the witness—as shown by his testimony—had not worked for the defendant for four or five years previous to the accident upon

which the said actions are based. The answer of the witness to the question above was, "Yes, sir." (Assignment No. II, R. pp. 157, 158, 97.)

II

The court erred in not granting the motion of the defendant for a nonsuit for the following reasons:

(a) That there was a material variance between the complaints and the proof thereof, in that all the complaints alleged that at the time of the accident "there were standing on said track No. 12 and commencing about 4 feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation," when the evidence of the plaintiff conclusively showed that the last car in the string extended over said alleged path for a distance of almost its entire length.

(b) That the testimony did not show that said defendant company was guilty of any negligence sufficient to entitle the plaintiff to recover.

(c) That the plaintiff's evidence established that decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions, which

directly contributed thereto, in attempting to cross the defendant's switch track at the place where he was injured, there being on the track a car directly in front of him, so that he was obliged to walk westward almost the entire length of the car, and in then attempting to cross immediately at the very end of the car.

(d) That the plaintiff's evidence further established negligence on the part of the plaintiff and his wife, the parents of the decedent, which directly contributed to the injuries, in that when they accompanied the decedent and his brothers to the place of the accident on previous occasions, they ordered and permitted the decedent and the others to climb over and under the couplings between the cars, and on the occasion of the accident, they allowed the decedent to cross over the track at the place of the accident unaccompanied by them, or either of them, or at all. (Assignment No. III, R. pp. 158, 159, 110.)

III

The court erred in not granting defendant's motion for a directed verdict:

(a) For the same reasons given in subdivision (a) of assignment No. III.

(b) For the reason that the evidence was insufficient to justify the verdict against defendant.

(c) That the evidence did not show that the said defendant was guilty of any negligence sufficient to entitle the plaintiff to recover.

(d) That the evidence established that the decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions, which directly contributed thereto, in attempting to cross the defendant's switch track at the place where he was injured within the defendant's switch yards, there being at that time on said track a car directly in front of him, so that he was obliged to walk westward almost the entire length of said car, and in then attempting to cross immediately at the very end of said car, said car being at that time and place one of a long string of cars attached together, the eastward end not being visible to the decedent and his brother.

(e) The evidence further established without question negligence on the part of the plaintiff and his wife, the parents of the decedent, consequent beneficiaries under these actions, which negligence directly contributed to the injuries, in that when they accompanied the decedent and his

brothers to the place of the accident on previous occasions, they ordered and permitted said boys to climb over and to crawl under the couplings between the cars, and on the occasion of the accident, they allowed the decedent and brother to go upon the switch track unaccompanied by them, or either of them, or at all. (Assignment No. IV, R. pp. 159, 160, 135, 136.)

IV

The court erred in refusing to give the instruction requested by the defendant which reads as follows:

“The court instructs you that if you find from the evidence that a footpath across defendant’s track No. 12 was acquired by user and that a person traveling on same across said track was not a trespasser, you are further instructed that any material deviation from said footpath in crossing said track would constitute the party making such deviation in crossing said track a trespasser thereon;”

for the reason that such instruction was in accordance with the law and under the facts of the cases, and for the reason that the decedent departed so far from the alleged path as to make it a question for the jury to determine whether or

not his status had been altered from a licensee to a trespasser. (Assignment No. V, R. pp. 160, 161, 147, 148.)

V

The court erred in rendering and entering any judgment in favor of plaintiff and against the defendant in said causes, for the following reasons:

(a) That the plaintiff in said causes had no capacity to sue.

(b) That the filing of the second amended complaint in cause No. 7018, did not aid the verdict and judgment theretofore rendered and entered.

(c) That none of the complaints in said causes stated facts sufficient to entitle the plaintiff, or plaintiffs, to any judgment against the defendant.

(d) That the alleged cause of action in the amended complaint in cause No. 7018, is the same as set forth in the amended complaint in cause No. 7019. (Assignment No. VI, R. pp. 161, 2 to 11 inclusive, 25 to 45 inclusive.)

ARGUMENT

I

NO NEGLIGENCE IS SHOWN, AS ALLEGED OR OTHERWISE

The negligence charged in the complaints against the defendant was, that there was no employee stationed on or near the cars; that no warning was given that the cars were to be moved, and that it and its employees bumped one of the engines at the eastern end of the line of cars, causing the accident, which resulted in the death of the boy. If the defendant was under no obligation whatever to give any warning as to the movement of its cars at that time and place this court need go no further in its consideration of this case.

It is conceded that the accident happened within the switch yard of the defendant. It is further conceded and conclusively shown that the Roman boys were upon the switch track by no invitation from the defendant, express or implied, but were using same purely for their own personal convenience. The most favorable status that could be given them—even though the court believes that

the track was used extensively in crossing the same by pedestrians—is that of naked licensees. The supreme court of the state of Washington has fixed their status beyond peradventure of a doubt, in the case of:

Olson v. Payne, 116 Wash. 381.

This case is so recent and so nearly parallel with the cases at bar, that we desire to call the court's particular attention to same. The plaintiff in said case was a boy, twelve years of age, and was injured by having been struck by a Great Northern Railway engine while traveling upon the right of way within the City of Everett, Washington. In this connection the court said:

“For many years pedestrians have been in the habit of traveling the right of way from the depot to the south, past the point mentioned and on toward the town of Lowell. The amount of such travel on the right of way was such that those operating the trains must have been aware of the custom.”

The court further said:

“The chief question argued by both sides is as to whether the boy was guilty of such contributory negligence that, as a matter of law, and notwithstanding the verdict, we may say that he cannot recover. He is of average intelligence and experi-

ence. He has succeeded in making from year to year his various school grades. He was thoroughly acquainted with the immediate neighborhood where he was injured; he had been there and on those tracks a number of times, both alone and with his parents. He had some two or three years before lived within a block or two of a railroad. His parents had time and again warned him about the danger of being on the tracks. His age, his intelligence and his experience must have made him know as fully as anyone could know, that he was in a place of danger; that he must keep away from the trains; that he would be killed or hurt if he got too close to them. That he knew and fully appreciated these things is shown by the fact that when he first came to the tracks he looked in both directions to see if any trains were coming.

“Many, and probably a majority, of the courts of this country have held that a child five or six years of age or under, cannot, but that a boy of ten or twelve years of age may, under some circumstances, be guilty of such contributory negligence as will preclude recovery for his injury. The facts in any two personal injury cases are never the same. Each case must be decided upon its own peculiar facts. In determining whether this boy was guilty of such negligence as to preclude recovery, we must take into consideration his age, his intelligence, his experience and his knowledge of the surrounding circumstances. In so doing we must not hold the boy to that strict accountability to which we would hold one who had reached older years. But the matters for the respondent’s con-

sideration to assure his safety were of the most simple and elementary nature. There were no other noises or trains to confuse; the situation was not such as to require a sudden election what course to pursue. It is true he says the whistle was not blown and the bell was not rung, although nearly everybody else testified to the contrary, yet the purpose of giving those signals is to warn. In this case we have a freight train of some sixty cars approaching him, laboring heavily to make a curve and gain speed. It does not need testimony, although there is plenty in the record, to inform us that, under those circumstances, the train must have made a great noise. The boy says that he did not hear the noise of the oncoming train, but if he was exercising such reasonable care as a boy of his age, experience and intelligence must, as a matter of law, exercise under like circumstances, he must have heard it. There was nothing here, so far as the testimony shows, to distract his attention. It seems impossible to look upon this case otherwise than that the respondent wholly failed to give any heed to his surroundings. We must, of course, hold that he must have exercised at least a small amount of care, and yet it seems to us that he did not use any.

“That court is justified, notwithstanding the verdict of the jury, under proper circumstances, in holding, as a matter of law, that a child twelve years of age has been guilty of such contributory negligence as precludes his recovery, is shown by the following citations, selected from many of like character: *McGee v. Wabash R. Co.*, 214 Mo. 530,

114 S. W. 33; *Studer v. Southern Pacific Co.*, 121 Cal. 400, 53 Pac. 942; *Texas & Pac. R. Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852; *Schoonover v. Baltimore & Ohio R. Co.*, 69 W. Va. 560, 73 S. E. 266; *Kyle v. Boston Elevated R. Co.*, 215 Mass. 260, 102 N. E. 310; *Adams v. Boston Elevated R. Co.*, 222 Mass. 350, 110 N. E. 965; *Derringer v. Tatley*, 34 N. D. 43, 157 N. W. 811. In this connection we call attention to the notes commencing on page 10, L. R. A. 1917F; notes commencing at page 123 of the same volume, and notes commencing at page 172 of the same volume. The authorities are elaborately collected and digested in these notes. We have recognized the same doctrine in the case of *Oregon R. & Nav. Co. v. Egley*, 2 Wash. 409, 26 Pac. 973, 26 Am. St. 860, where we held that a boy nine and one-half years of age was, as a matter of law, guilty of such contributory negligence as to bar his recovery. See, also, *Clark v. Northern Pacific R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508.

“A very conscientious study of the facts of this case leads us to the necessary and inevitable conclusion that, under all the circumstances, the respondent was, as a matter of law, guilty of such contributory negligence as bars his recovery. . . .

“Again, the respondent was but a naked licensee on appellants’ tracks and he could recover only for wantonness or wilfulness on the part of the appellant. In this as well as in other regards this case is controlled by *Scharf v. Spokane Inland Em-*

pire R. Co., 92 Wash. 561, 159 Pac. 797, and cases there cited."

Such is the law of the state of Washington governing a situation almost identical with the one we find in the cases at bar.

That the Federal Courts apply the laws of the state in which causes of action of this nature arise, is well illustrated by the case of

Schmidt v. Pennsylvania R. R., 181 Fed. 83.

In that case the plaintiff, a boy of eight and one-half years of age, was injured while crossing tracks of the defendant between the cars of a parted freight train, at a point between certain streets in the City of Newark, New Jersey. It was at a point frequently used by pedestrians in crossing the tracks and to such an extent that two well defined paths led up to the track and converged at the path over which the boy traveled. This conditions had existed for several years and was well known. On the day of the accident, the plaintiff and a boy companion started to cross the track at said point and found that a long string of freight cars had been cut in two parts at the path. The first boy got safely through, but the plaintiff caught his foot, fell down, and the cars

coming together at that moment, severed his leg. The court in that case said:

“The contention is that, by the long acquiescence of the defendant company in the use of the paths running up to and crossing their right of way, the public had acquired the right to cross at that point, which the company was bound to take notice of and respect; and that, having cut and opened the train, which was on the westerly track, at the point where the path crossed it, the men in charge of the train, before closing the opening, were bound to give warning, either by some one stationed at the place for the purpose, or by the engine, at the other end, whistling or ringing its bell; and that to bump the cars together without notice, and without regard to whether any one was going across, as was done, was negligence which made the company liable to any one such as the plaintiff, who was injured thereby.

“It is to be noticed that the plaintiff was not struck and thrown down by the sudden movement imparted to the cars, but in some unexplained way his foot was caught by the rail and he was thrown forward; the wheels of the cars coming on him and cutting off his foot, while he lay in that position. It is not altogether the same therefore as if the cars, being suddenly started, bumped into him and threw him down. The accident resulted because he tripped and fell, without which it apparently would not have occurred. But passing this by, if the company, as contended, was bound by long acquiescence to respect this cross-

ing, and after opening the train as it was required, before closing it again, to give reasonable warning, the plaintiff had a right to rely on this, and was entitled to go in between the standing cars, without incurring the danger of being caught by any sudden movement of them. And even though the immediate occasion of the accident was the catching of the plaintiff's foot under the rail, the result is not so remote but that it may be attributed to the neglect of the company, in failing to give due and timely warning, if that obligation in fact rested upon it.

"It is the established rule in some jurisdictions that, where a railroad company for a long period of time has permitted the public to cross or travel along its right of way between certain points, it owes the duty of reasonable care to persons so using it, and cannot approach the place with moving trains without giving due and customary warning. 23 *Amr. & Eng. Cycl. Law* (2 Ed.) 740, 741, This is the rule in Pennsylvania. *Taylor v. Delaware & Hudson Co.*, 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446. As it is in New York: *Swift v. Railroad*, 123 N. Y. 645, 25 N. E. 378. See also *Harriman v. Pittsburg, etc. Railroad*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, and *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361. But it is not the rule in New Jersey, where, under such circumstances, persons using the crossing are regarded as mere licensees, towards whom the railroad owes only the duty of not doing wanton or wilful injury. This is well established, and is illustrated by several cases. Thus in *Vanderbeck*

v. Hendry, 34 N. J. Law, 467, the premises where the accident occurred was a lumber yard, which was uninclosed, and where persons were in the habit of crossing from street to street, making use of the passageways left between the lumber. The plaintiff having gone into one of these passageways was injured by the fall of a pile of lumber, which had been piled up in a negligent manner, and it was held that he could not recover. Being on the premises, as it is said, by mere license, and not by invitation, while relieved thereby from responsibility as a trespasser, he assumed the risk of the place, and the business carried on at it, and the owner owed him no duty except to abstain from acts of wilful injury. This was reaffirmed in *Phillips v. Library Company*, 55 N. J. Law, 307, 27 Atl. 478, where, however, in view of the facts of the case, it was held that a different rule prevails, if the entry or use of the land is of right or by invitation of the owner, as distinguished from an entry by license or sufferance; the owner in the former case being under the duty of exercising ordinary care to render the premises reasonably safe, or at least to refrain from any act that will make the entry or use of the premises dangerous. In *Devoe v. New York, Ontario & Western R. R.*, 63 N. J. Law, 276, 43 Atl. 899, the residents along a railroad track which, four years before the accident which resulted in the death of the plaintiff's decedent, was inclosed by a fence along the company's right of way, built a stile over the fence without the consent and notwithstanding the refusal of the company to permit

it, so that they might go directly across the tracks to an adjoining station and a street beyond it. The plaintiff's decedent on her way to school, made use of this stile, and in crossing the tracks of the company, just before she reached the platform of the station, was struck and killed by one of the company's trains; and it was held that mere acquiescence in the passage across the railroad for the benefit or convenience of the parties using it created no duty on the part of the railroad company except to refrain from acts wilfully injurious, and, consequently, that there could be no recovery. So in *Furey v. New York Central & Hudson River R. R.*, 67 N. J. Law, 270, 51 Atl. 505, a painter, who was at work assisting to paint a railroad shed, which covered the central portion of a river pier, while on his way to change his working for his street clothes, which he had left in the interior of the building, was injured by the closing together of two freight cars, between which he was passing, within the shed, which were moved by the company without warning. It was contended that by opening the train and leaving spaces between the cars, as was habitually done in the shed, which spaces were used with the knowledge of the company, by men at work on the job, to cross from one side of the building to the other, there was an implied invitation to the men who use these openings, and that a duty devolved on the company in consequence to give warning before closing them. But this was rejected, and it was held that the company was in no way liable, the openings between the cars being varied from day to day according

to the exigencies of the business, as it became necessary to have a car unloaded at one place or another; and that the fact that the plaintiff and others passed through these openings repeatedly without molestation with the knowledge of the company afforded no evidence or encouragement that the company intended them to use them. Such knowledge, it was said, might imply permission, but did not amount to an invitation, without which element there was no duty on the part of the company to give warning, or in fact to do anything, except to abstain from that which was wilfully injurious.

“The present case does not differ in principle from *Pennsylvania R. R. v. Martin*, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361, decided by this court, in which the same rule was enunciated. The plaintiff there was injured by something which fell from a passing train, as he was walking along the right of way of the railroad on a customary path leading from a pottery plant, where he was employed in the city of Trenton, to the platform of an adjoining station. This path had been used for a long time by employees of the pottery plant in going to and from their work without objection on the part of the railroad company; and on the occasion in question the plaintiff was going to the station to meet a friend, who was coming in on the train. It was contended that, under the circumstances, he was not on the defendant's right of way by mere sufferance, but by implied invitation; but it was held that the acquiescence of the company in the adoption of the path along the right

of way, as a means of going to and from the station, did not invite passengers or others having business there to make use of it, and did not therefore impose upon the company any duty beyond what it owed to a mere licensee. See, also, *Sutton v. West Jersey R. R.*, (N. J. Sup.) 73 Atl. 256; *Riedel v. West Jersey R. R.*, (C. C. A.) 177 Fed. 374.

“These cases which are declaratory of the local law as established by a long line of decisions of the highest courts of the state, recognized and enforced in this court, are conclusive upon the plaintiff, and require an affirmance of the judgment. Assuming that there was a customary path, leading up on either side to the railroad tracks where the accident occurred, by which the people of the neighborhood were wont to pass across these uninclosed lots and that this had existed for such a length of time that the company was affected with notice and presumed to acquiesce in it, the use was merely a permissive one, which under the New Jersey law imposed no higher duty than not to do that which was recklessly or wilfully injurious. Nor was this duty modified by the fact that, on the occasion in question, the train which was occupying one of the tracks, and which was the cause of the accident, had been opened at the point where the paths converged, which fact cannot be wrested into an invitation or allurement to the plaintiff to go in between the cars in the course of crossing over, so as to require a warning from the trainmen in charge before closing the cars together. The use was still merely a permissive one, and the

plaintiff stood in no higher relation to the company than that of a licensee, who took all the ordinary risks incident to the place and the business, among which was the moving or shifting of the cars occupying the track, back and forth upon it, according as it became necessary. The plaintiff therefore had no case, and a verdict for the defendant was properly directed.

“Judgment affirmed.”

One of the leading cases pertinent to the ones at bar and cited in numerous subsequent decisions by the courts of various states, is that of:

Cleveland, C. C. & St. L. Ry. Co. vs. Tartt,
64 Fed. 823.

The court, at page 826, lays down the law governing such a situation as follows:

“The decedent, accompanied by his son, was, when killed, walking on or dangerously near to to the track of the company. He was not on or near any highway or street crossing. He was traveling along the right of way for his own convenience, without any invitation, express or implied, and with knowledge of the danger to life and limb from passing trains. It is true that he was killed while attempting to rescue his son from impending peril, but he had, by his own voluntary act, brought his son into a situation of danger, which gave rise to the peril. The only excuse offered for such conduct was that the defendant had suffered other people to travel along its right of

way without interference or objection. He was traveling upon the defendant's right of way, not for purpose of business connected with the railroad but for his own convenience, as a footway, in reaching the village of Venice. The right of way was the exclusive property of the defendant, upon which no unauthorized person had the right to be for any purpose. It was a place of known danger, and there was nothing to exempt the decedent from the character of a wrongdoer and trespasser in traveling along the right of way further than the implied consent of the defendant arising from its failure to interfere with the previous like practice by others. But because the defendant did not enforce its rights, and warn people off its premises, no right was thereby acquired to use its roadbed as a place for public travel. At most, it was used by sufferance, which amounted to no more than a mere naked license, and imposed no obligation on the part of the owner to provide against the danger of accident. The person who used the right of way for his convenience went there at his own risk, and enjoyed the implied license with its attendant perils. *Elevator Co. v. Lippert*, 18 U. S. App. —, 11 C. C. A. —, 63 Fed. 942. The decedent, then, stood in no more favorable position than that of a wrongdoer or trespasser. He was at the time of the accident in the exercise of no legal right, and at most was in the enjoyment of a naked license implied from the previous use of the right of way by others; and the rights and obligations of the decedent and the company are to be measured as in the case of par-

ties thus situated. Where both parties are equally in the position of right which is enjoyed by each independently of the other, the plaintiff is only bound to show that the injury was occasioned by the negligence of the defendant, and that he exercised ordinary care to avoid it. But where the plaintiff is a wrongdoer or a trespasser, or is in the enjoyment of a naked license for his own convenience, without any invitation, express or implied, from the owner of the premises, he cannot maintain an action for an injury without averring and proving that the injury was wilfully inflicted, or that it was caused by negligence so gross as to authorize the inference of wilfulness. As he was a trespasser, no action will lie against the company for causing his death unless the act of its employees in charge of the train was wilful. A trespasser cannot maintain an action where the tort complained of consists of nothing more than the omission to exercise care. *Railroad Co. v. Graham*, 95 Ind. 286; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. 70; *Beach, Contrib. Neg.*, (2d Ed.) §§ 198-201, 203. In the case of *Railroad Co. v. Godfrey*, 71 Ill. 500, it is held that the right of way of a railroad company is its exclusive property, upon which no unauthorized person has a right to be for any purpose, and that any one who travels upon it for his own convenience is a wrongdoer and trespasser; that the mere acquiescence of the company in the use of its right of way by persons passing along for the purposes of travel does not give such persons a right of way over the track, nor is the

company bound to protect or provide safeguards for persons so using it; and that a person so traveling along the right of way, where he is liable to come in collision with a passing train, is guilty of gross negligence, and he cannot maintain an action for an injury received while so traveling without averring and proving that the injury was wilfully or wantonly inflicted, or that the negligence of the company was so gross as to justify the inference of wilfulness. In the case of *Railroad Co. v. Hetherington*, 83 Ill. 510, it is held that, where an ordinance of a city prohibits railway companies from running their trains in the city at a greater rate of speed than six miles an hour, the running of a train at a rate of fifteen miles an hour, resulting in the death of one wrongfully upon the track, will not make the injury wilful on the part of the company. In the case of *Blanchard v. Railway Co.*, 126 Ill. 416, 18 N. E. 799, it is held that, where a person is killed by an engine or train while wrongfully on a railroad track—as, where he is walking thereon for mere convenience or pleasure, not at a public crossing—he is guilty of such gross negligence as to preclude a recovery by his personal representatives against the company operating the engine or train, unless his death is caused wilfully or wantonly, or the company is chargeable with such gross negligence as is evidence of wilfulness. The case of *Railroad Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. 812, affirms the same doctrine. In *Johnson v. Railroad Co.*, 125 Mass. 75, it is held that a person injured while trespassing on a railroad track, by coming in col-

lision with a train, is guilty of negligence which, as matter of law, will preclude his maintaining an action therefor unless the injury was wilfully inflicted. This doctrine is affirmed by the same court in cases too numerous to justify citation. Such is the settled law in other jurisdictions. *Railroad Co. v. Munger*, 5 Denio, 255; *Chrystal v. Railroad Co.*, 105 N. Y. 164, 11 N. E. 380; *Cusick v. Adams* 115 N. Y. 55, 59, 21 N. E. 673; *Heil v. Glanding*, 42 Pa. St. 493; *Gillis v. Railroad Co.*, 59 Pa. St. 129; *Railroad Co. v. Filbern*, 6 Bush, 574; *Canal Co. v. Murphy*, 9 Bush, 522; *Railroad Co. v. Depew*, 40 Ohio St. 121; *Railroad Co. v. Houston*, 95 U. S. 697."

There is no question as to the facts in the cases at bar, and in view of the law laid down in the above decisions, it is manifest that the court erred in not granting a non-suit at the close of the plaintiff's case, and in not granting a directed verdict at the close of all the testimony in said cases. The facts show, by the testimony of the father, that the injured boy was a very bright lad, and plaintiff's exhibit 4 was introduced to show that he was very proficient in school. (R. p. 85.) He had been going over the track to the dump pile for a year. (R. p. 88.) He had been warned by his parents to look out for cars around there. (R. pp. 87, 88.) The track over which he attempted to pass at the time of the accident was the one most used of any

in the whole yard, being often used as many times as a hundred a day. (R. p. 124.)

To digress a moment, we wish to call the court's attention to the fact that the testimony shows without dispute that the defendant's employees had been using this track for many years ever since it was constructed just as they were using it that day, and no accident had ever occurred previously. (R. pp. 90, 125.) There is but one of two conclusions from such facts: Either the track was not crossed as extensively as plaintiff would have the court believe, or that people using same were very careful to avoid it when there were any railroad men around. But this is of little consequence under the law as laid down in the state where the cause of action arose. Under that law the deceased boy was but a licensee on the switch track, and the plaintiff could recover only for wantonness or wilfulness on the part of the defendant, and it is conceded that neither was shown.

One of the best recognized text books upon this subject is Elliott on Railroads. In volume 3, §1154 of said text we find the rules governing situations of this kind as follows:

"Yet, although the place is used repeatedly and frequently as a crossing with the mere silent ac-

quiescence of the company, or with the knowledge and simply passive permission of the company, it would seem that the traveler who uses it is at most a bare licensee, who takes his license with all its concomitant risks and perils, and as a general rule, the company owes him no duty greater than that which is due to a trespasser. In order to impose upon the company the duty to treat a place as a public crossing, those who use the place as a crossing must either have a legal right to so use it, or must use it at the invitation of the company, and 'neither sufferance, nor permission, nor passive acquiescence' is equivalent to an invitation. If, however, the traveler uses a place as a crossing by invitation of the company, it must use ordinary care to prevent injury to him, as, where the company constructs a grade crossing and holds it out to the public as a suitable place to cross. Where by fencing off a foot way over its tracks it induces the public to so use it, by building to the track plank bridges for foot passengers, or by constructing gates in the railroad fence for the use of pedestrians who habitually cross the track, it thereby holds out the place as proper for them to use. Such invitation as imposes on the company the duty of ordinary care is implied, where by some act or designation of the company persons are led to believe that a way was intended to be used by travelers or others having lawful occasion to go that way, and the company is under obligation to use ordinary care to keep it free from danger. There is much conflict of authority as to what constitutes such a general use of a place as a cross-

ing or such recognition of the right to use such a place as will impose upon the company the duty of observing the precaution required at public crossings, but we think the doctrine we have expressed is the true one supported by the best reasoned cases and by the recognized principles of law. The opposite view has been taken in a line of cases in which it is held that if the place has been used as a passageway for a long period of time and this use is with the knowledge and permission of the railroad company, it is its duty to treat it as a highway, and that where the railroad company licenses the public to make a general use of a crossing over its track, it can not treat a person who walks upon it as a trespasser, but some of these decisions seem to impose upon the company a greater duty than is due to a bare licensee, and the traveler is no more than a bare licensee, unless he has a legal right to be on the track, or is there by invitation of the company."

A great mass of cases supporting the above proposition is cited in the notes in said text.

The place where the accident happened in the cases at bar was not in a thickly populated part of the city, but out in the switch yard, at least five blocks from any houses. (R. p. 50.) There was nothing to indicate that such a place was a crossing, as there were no planks laid between the rails for the convenience of foot passengers, and it was only with the utmost difficulty that people could

cross the track with a vehicle, such as the one propelled by the boys on the day of the accident.

In view of all the evidence, we do not feel that we are asking so much to set aside the verdicts as to revoke donations which it was not within the power of a well-meaning jury to bestow.

II

CONTRIBUTORY NEGLIGENCE OF DECEASED AND PARENTS WAS THE PROXIMATE CAUSE OF THE ACCIDENT AND SHOULD BAR RECOVERY

Seldom is one cited to such glaring acts of negligence on the part of parents seeking to recover damages, and on the part of the decedent, than in these cases. The parents, who are beneficiaries under these actions, by their own admissions, took their children, including the decedent, to the switch track at or near the place of the accident, and directed and permitted them to crawl over and under the couplings between the cars (R. pp. 87, 106, 107), and, as the mother testified at the coroner's inquest, right under the cars. (R. p. 112.) Just imagine the example of recklessness and total disregard for their safety that was set by the parents! The father admitted upon cross-exam-

ination that he knew the track was used a great deal (R. p. 88), and with that fact in mind, the parents not only permitted the children to crawl between the cars, but encouraged them in doing so by doing the very act themselves. Is it any wonder that this boy was struck by a car that only moved two feet (R. p. 94), after being accustomed to such examples of reckless disregard for one's safety?

The decedent was a bright boy of twelve years; the only person now living who was present—the other boy, ten years of age at the trial—testified that when they reached the track they looked and listened. The decedent was old enough to appreciate the fact that looking toward the end of a string of boxcars which end could not be seen, gave no assurance that there was no engine attached to that end. This boy was not a country boy, unaccustomed to a railroad and its operation. The decedent had lived for years within a couple of blocks of the tracks and had been going over the very place he was injured for a year, and knew that the switch track was used very frequently, yet with that knowledge and experience he endeavored to cross the track right up against the last car in a long string, with one of the most awkward vehicles to handle—a wheelbarrow—when

for a distance of at least three hundred feet, or clear to the First avenue trestle, he had an unoccupied track at any point of which he could have crossed in safety. (R. pp. 93, 94, 95.) This was not a case where the decedent was called upon to act on the instant, or where trains were passing causing great confusion. He stepped from a place of safety beside the track upon the track and immediately against the car. If he had been exercising the care and caution testified to by the younger brother, both of them would have heard the noise created by the cars bumping together for a considerable length of time before the last car moved.

The court in the case of *Wallace v. New York N. H. & H. R. Co.*, (Mass.) 42 N. E. 1125, in passing upon a similar case said:

“Everybody knows that it is physically impossible for a long freight train to back up in such a way as to move the rear car suddenly and quickly, without giving warning of what is to be expected by the previous movement of the locomotive and the cars near it.”

In the case of *Olson v. Payne, supra*, the contributory negligence of the plaintiff was not a bit more pronounced than that of the decedent in the cases at bar.

III

ERROR IN ADMISSION OF TESTIMONY

W. H. Barr, a witness for the plaintiff, had at one time served the defendant as yardmaster at Argo. The testimony, however, showed that he had not worked for the defendant for at least four and possibly five years previous to the accident. (R. p. 99.) The court, however, allowed him to testify that he had some knowledge that the public was using the path. (R. p. 97.) It is quite evident that in allowing this testimony to go to the jury, the trial court committed prejudicial error, in view of the fact that the witness had left the employ of the defendant so many years before the accident occurred, and such testimony for that reason was immaterial in the highest degree. Counsel for plaintiff may contend that he had answered the question just a moment before, but it was evident to all that the jury did not hear him, and when same was repeated, the question was objected to, as is seen in the record.

IV

ERROR IN REFUSAL OF INSTRUCTION

If under any theory of this case, the same should have gone to the jury, the court committed preju-

dicial error in its refusal to give the following instruction:

"The court instructs you that if you find from the evidence that a footpath across defendant's track No. 12 was acquired by user and that a person traveling on same across said track was not a trespasser, you are further instructed that any material deviation from said footpath in crossing said track would constitute the party making such deviation in crossing said track a trespasser thereon." (R. p. 160.)

In the case of *Southern R. Co. v. Fisk*, 159 Fed. 373, this very question was passed upon by the Circuit Court of Appeals. The fourth paragraph of the syllabus of said case reads as follows:

"In an action for injuries to a boy being run over by the defendant's train just outside the line of a street crossing, whether plaintiff in the position he had taken was a trespasser, or whether he had not so far departed from the highway as to deprive him of the rights of a traveler, held for the jury."

In that case the facts show that the plaintiff had only departed from a legitimate street crossing a distance of from two and a half to six feet, while in the cases at bar the decedent had left the alleged path for almost a box car length. The court in the *Fisk* case, *supra*, at pages 376, 377, says:

“While the company may be chargeable with notice to guard against injury at the highway crossing, and with corresponding duty in its operations there, no such notice or duty is implied in the case of the trespasser, not at or near a public way, and thus gives rise to the separate rule, to be defined under the next proposition. In the view above stated, the defendant was not entitled to direction of a verdict in his favor, as a conclusion of law under the testimony, that the plaintiff was in the relation of trespasser when injured; and error is not well assigned for the denial of the motion and instructions requested upon that theory. The issues raised were purely issues of fact for determination by the jury. If the plaintiff was unmistakably attempting to cross the tracks upon the street crossing, and his deviation was accidental, as stated in the direct testimony, he was within the benefits of such crossing rule; for the exercise of reasonable care in the movement of the train, measured by the conditions which were either known or within the observation of the engineer and trainmen, and thus unaffected by the rule as to trespassers. On the other hand, if circumstances appeared which indicate that he was not attempting to cross upon the street, as the defendant contends—and we deem no expression of opinion thereon, under the present testimony, needful or proper—raising a question of fact whether he so entered as a trespasser and thus assumed the risks incurred by such entry, that issue, as well, was for the jury to determine and apply the rule of law which then became applicable.”

Clearly such a question as the extent of the deviation in the cases at bar was a matter calling for the instruction submitted by the defendant, and it was prejudicial error on the part of the court not to give same.

V

ERROR IN RENDERING AND ENTERING JUDGMENTS, BECAUSE ALL THE COMPLAINTS ARE FATALLY DEFECTIVE

Under the common law, there is no right to recover damages on account of anyone's death. There are in the State of Washington two statutes that have allowed recovery, where the facts warrant it, for the heirs and beneficiaries of the deceased.

Sections 183 and 183-1, Remington's Compiled Statutes of Washington, 1922, provide as follows:

"When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

"Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action

may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just."

Section 194 of Remington's Compiled Statutes provide as follows:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters, or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death."

The latest construction of the above statutes is found in the case of *Howe v. Whitman County*, 120 Wash. 247. That was an action brought by two minor children, through their mother, as guardian *ad litem*, and also in her individual capacity as the widow of H. B. Howe, against one Peter Zounick

and Whitman County to recover damages against the defendants as joint tort feasons on two causes of action. The first cause of action was for damages for pain and suffering sustained by the deceased from the time of his injury to the time of his death. The second cause of action was for damages through loss by death of H. B. Howe. The trial resulted in a verdict for the plaintiff in both causes of action against the county. The court in affirming judgment for the plaintiff on the first cause of action, and reversing judgment upon the second cause of action, said, on page 258:

“Section 183 (of old code) is exxpressly repealed by the act of 1917, ch. 123, p. 495, which now provides that actions for such wrongful death can only be prosecuted in behalf of the beneficiaries by the personal representative of the deceased. Section 194 gives no right of prosecution of an action by the personal representatives, but only gives the right to prosecute by the heirs and beneficiaries therein named. . . .

“The damages alleged in the first cause of action set up in respondents' complaint could only be recovered by them in their personal capacity, under sec. 194, Rem. Comp. Stat. The damages claimed in the second cause of action could only be recovered in a representative capacity under ch. 123, Laws of 1917, p. 495; Rem. Comp. Stat. secs. 183-183-3.”

As heretofore stated, in the cases at bar there have been three sets of complaints filed, viz: Complaints (R. pp. 2 to 11 inclusive), amended complaints (R. pp. 25 to 35 inclusive), and second amended complaints (R. pp. 35 to 45 inclusive).

After the complaints were filed the defendant interposed a demurrer to each one (R. pp. 12, 13), each of which was overruled by the lower court. (R. p. 14.) However, during the trial the court called the attention of counsel for plaintiff to the fact that in his opinion the parties plaintiff in each case had no capacity to sue. Amended complaints were then prepared and filed, bringing one action by the personal representative and the other by the parents. However, both amended complaints laid the causes of action therein set forth under section 194, Remington's Compiled Statutes, that is, the one relating to damages for pain and suffering. (R. pp. 29, 34.)

On February 16, 1923, more than a month and a half after the rendering and entry of judgment in cause No. 7018 below, second amended complaints were filed, bringing both actions by the personal representative, though the verification to the amended complaint in 7018 is made by the father in his per-

sonal capacity. It is very evident upon the face of the complaint that if the plaintiffs were correct in their contention that the party plaintiff in each action is the correct one, there would have been no necessity for preparing and serving two complaints, when one complaint would have served the purpose by setting up two causes of action. From an examination of the record in these cases, it is very evident that at no time has there been any complaints, amended or otherwise, sufficient to sustain a judgment in either case.

For the reasons above submitted, we contend that the judgments should be reversed.

Respectfully submitted,

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In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4049

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error

vs.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF THE CASE

On May 18, 1922, near 4:00 p. m., Edgar, aged 12, and Charles, aged 9, children of plaintiff, left their home with the objective of gathering wood from the city dump on defendant's property at Argo

Station. (R. 91.) Edgar was wheeling a wheelbarrow. (R. 91, Pltff's Ex. 95.) Their home was one-half mile from Second Avenue South and Dawson Street. From Second Avenue South and Dawson Street to dump was about one-half mile, over a well-defined and beaten footpath which had been in open, constant, notorious, and continuous use by the public generally for over twenty years. (R. 64-65-67-68-69-72-73-74-75-79-80-81-83-84-85-86 - 87 - 88-89-99-100-101.) Between fifty and sixty used path a day. (R. 68.)

The public had used the path for a short-cut into the city (R. 68-69); it was used by children going to and from school (R. 68-75); skating in winter in Argo Yard (R. 69-75-97); to go and come from work (R. 68-73); to go to and from the dump where they could obtain boxes, barrels, wood, refuse, tin, sheet metal, parts of autos, and condemned canned fruits and vegetables. (R. 69-74-80-81-86-97.)

The dump was an attractive nuisance, and people came from every side thereto. (R. 97.)

No sign had ever been posted by the defendant forbidding people from using the path. (R. 69-74-75-81-88-98-101.)

It was the only way for people of the south end to cross the track to get to the dump. (R. 69-83.)

About one-fourth or one-half mile from Second Avenue South and Dawson Street, path intersects with track No. 12. (R. 69-86, Pltff's Ex. 1.)

Many people would run in on the path with their automobiles and then walk over the path for the purpose of getting sheet metal and wood from the dump. (R. 74.)

Track No. 12 was used by the company to clean cars only. (R. 76-81-82-122-123.)

Track No. 12 had been in use since 1913. (R. 113.)

Cars have been left across the path, but the majority of times there was an opening left between the cars at the path. (R. 68.)

On both sides of the track was pasture and meadow land, the nearest house to the intersection being five blocks away. (R. 70-76-113-115.)

Before crossing the track, and as a continuation of the path, there were two planks over a ditch, and two trails leading up to the track. (Pltff's Ex. 2, R. 65-68-75-92.)

The defendant knew of the existence of the path, and that the public used it generally, and used it particularly for the purpose of getting wood from the dump. (R. 96-97.) They knew that there was a well-beaten path (R. 118-119), and planks over the ditch. (R. 118-119-120-132.) The yard master in charge of the Argo Yards at the time of the accident knew of the path and its use (R. 127-128), and that it had been used quite a while (R. 128-129-130), and that the public used it to go to get wood at the dump. (R. 130.)

The two boys entered the path at Second Avenue South and Dawson Street, and traveled along it until they reached track No. 12. Standing on the track, and extending south thereon at this time there were 57 box-cars, the south end of which was around a curve and could not be seen at the intersection with the path. (R. 91-97-124-126.)

As the boys came to the intersection of the path with the track, Charles leading and Edgar following with a wheelbarrow and axe, the end box-car was over the path, estimated from one foot to the length of a box-car. (R. 95-111.) Charles could not see the end of the cars. He looked down towards the end of the box-cars before he went across.

He could not see any man. He could not hear any whistle. He could not see any engine. He went across the track, and looked down the track. He did not see any switchman or employee of the railroad. He could not see any engine, nor hear any whistle; there was nothing that attracted his attention or warned him that those cars were going to move. Then Edgar came up to the track with the wheelbarrow and went to go across. He pushed the wheelbarrow between the tracks. When the wheelbarrow got on the track, the box-car next to them was about a foot away. Exhibit No. 5 is Charles and another boy and is the wheelbarrow that Edgar was pushing on the day at the time of the accident. The picture was taken at the place where Edgar was injured. Charles went to put the wheel over; it was in the position just like the picture. When they were in that position, the cars bumped and knocked the wheelbarrow and hit Edgar and knocked him down. Charles did not hear anything. The first thing he saw, it hit the wheelbarrow and knocked Edgar down. Edgar lay on the rail; his feet were on the real; and his head was on the other side of the rail. The car ran on his legs just enough to crush them, and then rolled back again. The fireman and engineer were in their places, and

the other three men were around and about the engine. None of the men in charge of the train was near the path. They could not see the path from their position. No watchman or switchman was on top of any of the cars. Without any warning whatever, the cars were pushed or kicked forward into and upon Edgar, and from his injuries he expired on the 22nd day of May. (Pltff's Ex. 5; R. 90-91-92-93-94-95-99-111-124-126.)

It was the custom for people when a car was over the path to walk down alongside of the cars until the end of the cars and then cross over. (R. 73-81-87.)

People could go to the dump down track No. 12, but would have to wheel a wheelbarrow between the tracks. (R. 132.)

First Avenue South was a high trestle. (R. 115.)

In Argo Yard there are twenty (20) tracks. (R. 128.)



LAW

The law as established in this state relative to accidents on railroad tracks at places other than established or public crossings is established by *Roth v. Union Depot Company*, 13 Wash. 525, 43 Pac. 641. The decision in this case, in which there is a discriminating review of cases on this point, stands affirmed by a long line of decisions in the state supreme court.

Steele v. N. P. Ry., 21 Wash. 293, 57 Pac. 820.

Eskilden v. Seattle, 29 Wash. 582, 70 Pac. 60.

McConkey v. O. W. R. & N., 35 Wash. 58, 76 Pac. 526.

Curtis v. O. W. R. & N., 36 Wash. 55, 78 Pac. 133.

Datta v. N. P. Ry., 36 Wash. 512, 79 Pac. 32.

Baker v. Tacoma & E. Ry., 44 Wash. 578, 87 Pac. 826.

Vinnette v. N. P. Ry., 47 Wash. 320, 91 Pac. 975.

Grant v. O. W. R. & N., 54 Wash. 683, 103 Pac. 1126.

Gregg v. King Co., 80 Wash. 204, 141 Pac. 340.

Imler v. N. P. Ry., 89 Wash. 534, 154 Pac. 1086.

Scharf v. Spokane & I. E. Ry., 92 Wash. 561, 159 Pac. 797.

And this decision is in accordance with the great weight of authority.

Hooker v. C. M. & St. P. R. R., 41 Am. & Eng. R. R. Cases 498.

Swift v. S. I. R. R. Co., 45 Am. & Eng. R. R. Cases 180.

Barry v. N. Y. C. R. R., 92 N. Y. 289.

Byrne v. N. Y. R. R., 104 N. Y. 362.

Kay v. Pennsylvania R. R., 65 Pa. St. 269.

33 ^{Cyc} Enc. of Law, 760-761.

33 ^{Cyc} Enc. of Law, 780-781.

23 Am. & Eng. Enc. of Law, 739-740.

33 Cyc., 766, 780.

In *Roth v. Union Depot Company*, the rule was given as follows:

“Where the public has been in the habit for a long time of using, at a point not in a traveled highway, the right of way of a railroad as a path in passing from one part of the city to another, and the railroad has knowledge of the fact that its right of way was so traveled by the public at almost every hour of the day, its acquiescence in the public use amounts to a license to so use its right of way, and imposes

the duty upon it to exercise reasonable care in the movement of its trains so as to protect from injury all persons crossing or traveling its tracks at that point." *In Steele v. N. P. Ry.*

"The great weight of authority is to the effect that it is negligence on the part of a railroad company to switch cars, unattended, down tracks in a populous city where many people are crossing the tracks over which the detached cars are switched. It is at all times and in all places an operation attended with more or less danger. In fact, this question was passed upon squarely by this court in the case of *Roth v. Union Depot Co.*, *supra*."

Steele v. N. P. Ry., 21 Wash. 287, 23 Am. & Eng. Enc. of Law, 2d. Ed. 745.

In *McConkey v. O. W. R. & N. Co.*, 35 Wash. 55, the court of this state drew a distinction between the relations of a trespasser and a licensee to a railroad company:

"In the case of the former, the company when moving its trains is under no obligations to keep a special look-out for him; but if he is discovered on the track in time to avoid injury by the exercise of reasonable care after such discovery, common humanity demands that such care should be used.

"In the case of a licensee, the company when moving its trains is charged with the additional duty of being in a state of expectancy of the probable presence of persons upon the track at places where travel thereon is known to be customary and fre-

quent. The care required in the case of a licensee, therefore, calls for both reasonable look-out in advance and a reasonable effort to avoid injury after discovery."

See, also, *Curtis v. O. W. R. & N. Co.*, 36 Wash. 55, 78 Pac. 133.

In *Imler v. N. P. Ry.*, 89 Wash. 527, in commenting upon the rule as expressed in *Roth v. Union Depot Company*, above, Chadwick, Judge, says:

"These cases are either crossing cases or cases from cities and towns where population is congested and the public has been accustomed to cross the tracks or to use them as a thoroughfare. And recoveries are allowed in such cases because a higher duty rests upon the railroad company under such circumstances. In moving trains over a crossing, streets of cities, in depot grounds, or in switch yards, the railroad company, from the nature of things, must have its trains under control and be constantly alert to the possibility of injuring persons or property. The crossing cases rest in an implied license upon legal grounds. . . . The company is held to a rule of strict accountability, because it is necessary for men and traffic to cross railroad tracks in the pursuit of their legitimate undertakings and conveniences. The law charges a company with a knowledge that they will do so."



ARGUMENT

I

Plaintiff in error contends in his argument that the accident happened in the switch yard, and that the Roman boys were upon the switch track by no invitation of the defendant, expressed or implied; but were using the same purely for their own personal convenience.

They were neither trespassers nor naked licensees under the great weight of authority. They were here as a matter of right and by invitation. The testimony was overwhelming, although vigorously contested and denied by the plaintiff in error, that there had been a notorious, constant, open, and continuous using of this path as a crossing by a great many people, with the knowledge of the railroad company. By acquiescing in its use, the company was charged with a knowledge that it was being so used and it was under the duty to exercise ordinary care to prevent injury. Even the least ordinary care would require a warning of some kind to be given, or that the railroad company would have someone in a position to see that the track was clear.

Counsel relies upon the recent decision of *Olsen v. Payne*, 116 Wash. 381, and quotes at length from that case, and quotes verbatim the citations thereof. *Olsen v. Payne*, is not a parallel case, nor has it any bearing upon the case at bar. There the court found that the boy was contributing to his own injuries so as to preclude his recovery in that he walked along the track, not across it; and he walked so close to the track, upon which a moving train was approaching, as to be struck by the engine or something projecting therefrom. He did not look back, and he failed to hear a train of sixty-seven cars and a laboring engine approaching him. The train had slowed down at the station to some four miles an hour; there were no other noises or trains to confuse him. The court found that he was guilty of contributory negligence; and it held that if he had been exercising such reasonable care as a boy of his age, experience, and intelligence must, as a matter of law, exercise under like circumstances, he must have heard it. There was nothing there to distract his attention.

There are two Washington citations given in support of *Olsen v. Payne*, *supra*:

O. W. R. & N. Co. v. Edgley, 2 Wash. 409,
28 Pac. 993, 26 Am. St. 860.

Clark v. N. P. Ry. Co., 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508.

In *O. W. R. & N. Co. v. Edgley*, *supra*, a boy of nine and one-half years was, as a matter of law, guilty of such contributory negligence as to bar his recovery. He was stealing a ride on the running board of a switch engine. He had been forcibly removed and kicked off under similar circumstances several times before, and had been repeatedly warned and cautioned against such dangerous practices. In *Steele v. N. P. R. R. Co.*, *supra*, Dunbar, Judge, in affirming the decision in the *Roth v. Union Depot Company* case, removed the decision in the case of *O. W. R. & N. Co. v. Edgley*, above cited, from all consideration in the case at bar with the statement that in that case the plaintiff was a naked trespasser who attempted to board a train of the defendant, unknown to the servants of the company, and he was hurt while engaged in an unlawful business.

Clark v. N. P. Ry. Co., *supra*, has no bearing upon the rule of law under facts such as exist in the case at bar. In that case, the injured party had the choice of another safe, public road parallel with the fence of the railroad company's yards. He elected to cross over the fence and over the tracks of the

defendant company where no crossing existed; was twice warned to get out and warned of his danger; and continued on in spite of the warnings; and hopped or jumped on a moving car and was injured.

The case of *Scharf v. Spokane Inland Empire R. R. Co.*, 92 Wash. 561, 159 Pac. 797, may support the ruling of *Olsen v. Payne*, *supra*, but it is inapplicable to the case at bar. In that case, the injured party walked along the middle of a railroad track, while on either side were wide paths equally as good which he might have traveled in safety; and, after seeing a switch engine, he never looked back again to see if it was in motion.

It is conceded that the Federal Courts apply the laws of the state in which causes of this nature arise, and require no citations of authority.

Plaintiff in error relies next upon the case of *Schmidt v. Pennsylvania Railroad Co.*, 181 Fed. 83, (New Jersey case), as sustaining his contention. That case may be distinguished from the line of decisions cited by respondent in error.

First. In that—

“The plaintiff was not struck and thrown down by the sudden movement imparted to the cars, but in some unexplained way his foot was caught by the

rail and he was thrown forward, the wheels coming on him and cutting off his foot while he lay in that position. *It is not altogether the same, therefore, as if the car being suddenly started bumped into him and threw him down.*" (Italics ours.)

The accident resulted because he tripped and fell, *without which* it apparently would not have occurred.

Second. The court admits—

"That it is a rule in some jurisdictions that where a railroad company for a long period of time has permitted the public to cross or travel along its right of way, it owes the duty of reasonable care to persons so using it, and cannot approach the place with moving trains without giving due and customary warning. See 23 Am. & Eng. Cyc. of Law, 2d Ed. 740, 741; Taylor v. Del. & Hud. Co., 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446; Swift v. Railroad, 123 N. Y. 645, 25 N. E. 378; Harriman v. Pittsburg etc. R. R., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; Garner v. Trumbull, 94 Fed. 321, 36 C. C. A. 361."

23 Am. & Eng. Cyc. of Law, 2d Ed., 739, more clearly quotes the rule:

"Where the public have for a long time notoriously and constantly been in the habit of crossing a railroad track at a point not in a traveled public highway with the acquiescence of the railroad company, such acquiescence amounts to a license and

imposes upon the company the duty to exercise reasonable care to protect such persons from injury. *Barry v. New York Central R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377; *Swift v. Staten Island Rapid Transit R. R. Co.*, 123 N. Y. 645; *Byrne v. New York Central Co.*, 104 N. Y. 362; *Larimore v. Iron Company*, 101 N. Y. 394.”

Again, quoting from *Schmidt v. Pennsylvania R. R.*, above cited:

“But it is not the rule in New Jersey where, under such circumstances, persons using the crossing are regarded as mere licensees, toward whom the rule was only the duty of not doing wanton or willful injury.”

After quoting a line of decisions arising in New Jersey, the court goes on to say that:

“These cases are declaratory of the local law as established by a long line of decisions of the highest courts of the state, recognized and enforced in this court.”

Counsel relies upon another case as pertinent to the one at bar, i. e., *Cleveland C. C. & St. L. R. R. Co. v. Tartt*, 64 Fed. 823; and quotes at length from that case and the cases cited supporting it, on the assumption that these cases support its position. The facts of *Cleveland v. Tartt* are given at length in counsel’s brief, and need not be again quoted,

except to show in what manner those facts are distinguishable. In the *Tartt* case, the distinguishing facts are these: The man and his son saw these trains travel at tremendous speed past their front doors every day, and they had knowledge of their tremendous speed. The decedent elected to walk along the right of way, "on or dangerously near the tracks of the company," knowing that the train was approaching at a tremendous speed, and looking back but once after seeing train approaching, and that only an instant before the accident, when he could have just as conveniently, and certainly more safely, walked along a public highway that ran parallel with and adjoining the railroad right of way.

In *Cahill v. C. M. & St. P. R. R. Co.*, 74 Fed. 285, in affirming the rule stated as being the weight of authority and as followed in this state in the *Roth v. Union Depot Co.*, *supra*, the court had this to say of the rule in *Cleveland v. Tartt*, and stating the rule given on page 27 of plaintiff in error's brief, the court continues and says:

"That much is due to a decent regard for human life and limb, and on the same principle it must be that in places on the tracks where people are accustomed to go and come frequently in considerable

numbers, and where by reason of such custom their presence upon the track is probable, and ought to be anticipated, those in charge of passing trains must use reasonable precautions to avoid injury, even of those who, in a strict sense, might be called trespassers. *But when a railroad company consents to the customary or frequent passing of people over its tracks, they cannot be deemed trespassers, and the duty is as clear as the necessity that locomotives and cars be moved with proper regard to their safety.*" (Italics ours.)

The adjudged cases on this subject are numerous. A leading case is *Barry v. Railroad Company*, *supra*, where there had been long acquiescence by the railroad to the crossing of its track. This was reaffirmed by *Byrne v. Railroad Company*, *supra*; also by *Taylor v. Canal Company*, 113 Pa. St. 162, 8 Atl. 43, where after a reference to the *Barry* case, the Supreme Court of Pennsylvania says:

"The principle clearly settled by the foregoing, and many other cases, is that when a railroad company has for years without objection permitted the public to cross its tracks at a place not in itself a public crossing, it owes the duty of reasonable care toward those using the crossing; and whether in a given case such reasonable care has been exercised or not is ordinarily a question for the jury under all of the evidence. In *Roth v. Union Depot Company* there is a discriminating review of the cases."

The case of *Railroad Company v. Godfrey*, 71 Ill. 500, which is cited in the extracts from *Cleveland v. Tart*, has been commented upon and disposed of by Dunbar, Judge, in *Roth v. Union Depot Company*, *supra*, as follows:

“The case of *Illinois Central Railroad Co. v. Godfrey*, 71 Ill. 500 (22 Am. Rep. 112) seems to decide squarely in favor of the appellant’s contention that the simple acquiescence of a railroad company in the use of its track or right of way, by persons passing along it, as a foot-way, does not give such persons a right of way over the track, and does not impose upon the company the duty of protecting or providing safeguards for persons so using its grounds; and this case was followed by the supreme court of Illinois in the case of *Blanchard v. Lake Shore etc. Railroad Co.*, 126 Ill. 416, (18 N. E. 799, 9 Am. St. Rep. 630); and the supreme court of Maryland in the case of *B. & O. Railroad Co. v. State of Maryland* to the use of *Allison etc.*, reported in 19 Am. & Eng. R. R. Cas. 83. These cases hold that the relative rights of the railroad company and the injured party are not changed by reason of the acquiescence on the part of the company in the use of its track or right of way, and it follows from the logic of the cases that the company would be held responsible only for such gross negligence as indicted wilfulness. The case in 71 Ill. 500, cites, in support of its conclusion the case of *Philadelphia & Reading Railroad Co. v. Hummell*, *supra*, and *Gillis v. Pennsylvania Railroad Co.*, 59 Pa. St. 199

(98 Am. Dec. 317). We think the Illinois supreme court mistook the logic of those cases, and such was the opinion of the supreme court of Pennsylvania, which reviewed the Hummell and Gillis cases in the case of *Kay v. Pennsylvania Railroad Co.*, 65 Pa. St. 269 (3 Am. Rep. 628), and in some subsequent cases, and distinguished them from a case where license by use had been established.”

Counsel contends that the court erred in not granting a non-suit at the close of the plaintiff's case, and in not granting a directed verdict at the close of all the testimony of said cases. Both motions were made on the ground that the evidence offered failed to show any negligence on the part of defendant to entitle recovery, and that the plaintiff's evidence established contributory negligence on the part of Edgar Roman and contributory negligence on the part of the parents. The court properly overruled both motions.

In *Steele v. N. P. Ry. Co.*, *supra*, the court on page 294, says:

“The great weight of authority is to the effect that before a court will be justified in taking from the jury a question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them. (p. 300) ‘it is frequently stated that when the facts are undisputed or conclusively proved, the question

of negligence is to be decided by the court. A better opinion, however, would seem to be that, in order to justify the withdrawal of the case from the jury, the facts of the case should not only be undisputed, but the conclusion to be drawn from those facts indisputable. Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should properly be left to the jury. (2 Thompson, Negligence, p. 1236.)' This court in *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799, decided that the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and that it is only in rare cases that the court would be justified in withdrawing it from the jury. This, too, was in a case where the court below had granted a motion for non-suit; and we laid down the rule that if different results might honestly be reached by different minds, then negligence is not a question of law but one of fact for the jury."

Counsel digresses a moment and points out that, although used daily, the track had never before been the scene of an accident; and draws certain conclusions as to its lack of use by plaintiff therefrom. That is merely an assumption on the part of counsel; for the record clearly shows that the issue of the use of the crossing by a great many people for a number of years in an open, notorious, and constant manner such as under the law would auto-

matically charge the company with the knowledge of its use, and the issue of the company's knowledge, and every other issue involved in the case was sharply drawn and hotly contested. The law of this state is clearly indicated in the *Roth* case, *supra*, and the long list of Washington decisions affirming it, *supra*.

The court properly and correctly instructed the jury as to the law of the case (R. 144), and, if anything, instructed more strongly in favor of the railroad company than the evidence justified when it gave its instructions almost verbatim from the opinion rendered by Rudkin, Judge, in the case of *Hamlin v. Columbia & Puget Sound Railroad*, 37 Wash. 448, in which he says:

“ but it is not to be inferred from slight circumstances that a railroad company has granted to the public the joint use of its track between given points. The track is constructed primarily for the purpose of carrying passengers and freight in cars. To permit its use as a footpath greatly increases the danger of those traveling in cars, and it is not the policy of the law to encourage such use; and unless a clear right to be upon the track is shown, a footman thereon is to be regarded as a trespasser. In certain instances, of course, a joint use must be reserved to the public; for example, the public must have the right to cross at fixed places,

and it is usually held that a public crossing has been acquired by user on much less evidence than is required to establish a public way along the track—the one being in nearly every instance a necessity while the other is usually only a mere matter of convenience.”

Counsel contends that Elliott on Railroads, volume 3, section 1154 (3d ed., par. 1657), is the law applicable to the case.

The last paragraph of counsels' quotation from Elliott on Railroads, correctly states the law of this state as to kicking and backing cars over a crossing. Elliott Railroads, 3d Ed., par. 1657, says:

“ such conduct, without taking any precautions, is ordinarily negligence *per se*.”

II

The deceased took every conceivable precaution that even adults could have taken in crossing the track. He stopped, looked, and listened. He was in the exercise of even more than ordinary care. A child of immature years is not required to exercise the same degree of care and caution to avoid injury as is required of adults under similar circumstances.

Roth v. Union Depot Company, *supra*.

29 Cyc. 535.

If the child was exercising ordinary care at the time of the injury, the rule of imputability can not apply.

7 Am. & Eng. Enc. of Law, 451.

And even if it did apply, ordinary care is all that is required of the parent, in watching and controlling a child.

29 Cyc. 556.

And it is not negligence to permit a child of discretion to cross the track where he is familiar with the place.

29 Cyc. 559.

However, the courts of this state have repudiated and denied the doctrine of imputability.

Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64.

Roth v. Union Depot Company, *supra*.

The question of the contributory negligence of the deceased and of the parents was a question for the jury.

Steele v. N. P. Ry., *supra*.

And the court properly instructed the jury on these matters.

III

Before the question that was objected to was answered, the witness, Barr, without objection, had testified that in Argo Yard there was skating on the swamp in winter time; quite a few used the skating place; that he had used it, and had seen other employees there, also children and lots of grown up people. People had used the path and track No. 12, and they had used track No. 13 to the skating place. He testified there was wood at the dump, and that he had noticed people using the path for the purpose of gathering wood. That he knew, as an official of the company, that people were using the path. (R. 97.)

* Counsel attempts to explain away the question Barr had answered the moment before, and says that 'it was evident that the jury did not hear.' There is nothing in the record to bear out that statement. We might equally say that it was evident that the evidence was so good, showing knowledge of the company's employees of the use of the path, that the question was repeated in order to fix it in the mind of the jury.

IV

The court very properly refused to grant the instruction requested as to deviation from the path.

“If there is any evidence from which the jury might justifiably find the existence or non-existence of the fact in issue and the evidence is conflicting or is such that reasonable men might arrive at different conclusions therefrom, the issue should be submitted to the jury for determination; and in such a case it is error for the court to take the question from them by non-suit, dismissal, direction of a verdict, or instruction.” (33 Cyc. of Law, 896.)

A requested instruction, covered by other instructions given, may be properly refused. (33 Cyc. of Law, 917.) Also an instruction that facts would be evidence of contributory negligence is very properly refused.

Mitchell v. Tacoma Ry. Co., 9 Wash. 121.

To have given the instruction asked for by counsel in the case at bar would have been taking the matter out of the hands of the jury, and would have required the court to pass upon it as a matter of law.

Counsel relies upon *Southern R. R. Co. v. Fisk*, 159 Fed. 373. Here the court said that where a

traveler was injured while crossing a railroad track and the injury would have been avoided by the exercise of care on the part of the train operatives, the mere fact that the traveler deviated from the street or highway boundary line at the crossing without obscuring his purpose of crossing or making such care unavailable for his protection did not absolve the railway company from its liability for negligence. Whether he is a trespasser or not under all the facts and circumstances in the case is a question for the jury. The court held that it was not error to refuse the railroad company a directed verdict.

V

The defendant demurred to the original complaints. Its demurrers were only on the ground that the complaints did not state facts sufficient to constitute a cause of action. (R. 12-13.) There were no demurrers interposed by defendant to the first or second amended complaints. At no stage of the proceedings did defendant interpose a demurrer or answer on the ground that the plaintiff had no legal capacity to sue.

Remington's Compiled Code, section 259, provides the grounds of demurrer as follows:

“The defendant may demur to the complaint when it shall appear upon the face thereof,—

“(2) That the plaintiff has no legal capacity to sue.”

Where no objection is made in the court below, either by demurrer or answer, to an alleged defect in the parties plaintiff, the question can not be raised in the supreme court:

Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760.

Hannigan v. Roth, 12 Wash. 695, 44 Pac. 256.

Jenkins v. Columbia Land Co., 13 Wash. 502, 43 Pac. 328.

Birmingham v. Cheetham, 19 Wash. 665.

James v. James, 35 Wash. 665.

37 Century Digest Co., 2592-2595, Sec. 170;
30 D. N. S. 152 note.

Birmingham v. Cheetham, *supra*, on page 665, in construing the above section, said:

“Section 189 of the code of procedure provides that the defendant may demur to the complaint when it appears upon the face thereof ‘(2) that the plaintiff has no legal capacity to sue,’ or ‘(6) that the complaint does not state facts sufficient to constitute a cause of action.’ Each of the grounds of demurrer specified by this section is separate and distinct from all others, and has no relation whatever to any other; and we therefore entirely agree

with the contention of counsel for the appellant that the question of want of legal capacity to sue was not raised by this demurrer in the court below, and therefore cannot be considered in this court."

In the case of *James v. James, supra*, on page 660, the court said:

"The appellant first contends that the allegations of the complaint in reference to the manner title was acquired to the real property in question show that the heirs at law of the deceased wife of the appellant have an interest in an undivided half of the property under the rule of the case of *Ahern v. Ahern*, 31 Wash. 334, and as the respondent's interests are confined to the other undivided half, it is of no concern to him who claim to be heirs at law of the first. But this, it seems to us, is only another way of saying that the respondent has no legal capacity to sue, and to that objection it is a sufficient answer to say that appellant did not demur to the complaint on that ground. The demurrer filed, as we have said, was a general demurrer, one going to the sufficiency of the complaint to state a cause of action, and such a demurrer does not raise the question of the capacity of the plaintiff to maintain the action. The want of legal capacity to sue is made a special ground of demurrer by the statute, and to raise it by demurrer it must be pointed out specially."

Objections relating to parties must generally be made promptly or they will be waived. 71 Am. Enc. of Law, 736.

A demurrer to complaint for want of sufficient facts presents no question as to jurisdiction of court,

Whitewater v. Bridget, 94 Ind. 216;

and does not reach a defect of parties.

Grain v. Aldrich, 38 Cal. 514.

The question raised has been decided adversely to counsels' contention by this court in the case of *Puget Sound Traction, Light & Power Co. v. Frescoln*, 245 Fed. 301, by the court through Judge Hunt speaking. After quoting in full sections 183 and 194 from Remington & Ballinger's Codes, volume 1, he says:

"It is true there has been but one negligent action; but that negligent action has given rise to two wrongs, one against the estate of the injured man, the other against his dependent relatives. In the survivor case (194), all the heirs of the deceased are beneficiaries of the verdict; while under the death statutes (183) only dependent relatives may be beneficiaries of the recovery. In the first action prosecuted by Mrs. Frescoln, she could not have recovered damages for the death of her husband. . . . *Swanson v. Pacific Shipping Company*, 60 Wash. 87, 110 Pac. 795, sections 183 and 194, hereinbefore quoted, were considered by the supreme court and it was held that each of the sections was intended to serve its separate purpose and

must be so construed as to secure that result. . . . This court has also discussed the general question and in *N. P. Ry. Co. v. Adams*, 116 Fed. 324, 54 C. C. A. 196, on a writ of error to the Circuit Court for the District of Washington held that under the statutes heretofore quoted there was a right of action in favor of the heirs or personal representatives of a person whose death was caused by the negligence of another to recover such damages as might be just, as a new and separate cause of action for damages for the loss sustained by such beneficiaries, and that such right was not dependent upon the right of the deceased to maintain an action for the act which caused his death had he survived. That decision in the case was reversed (in *N. P. R. R. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513) but there was no intimation that the view of this court as to the rights of action was not correct."

The facts of this case disclose that an action was commenced in the state court by the injured party for damages for injuries caused by the defendant. Before trial he died, and his wife, as administratrix, was substituted as party plaintiff (194). She recovered judgment. Later she commenced this action for wrongful death under section 183, and she obtained a judgment. The question before this court was whether under the statutes of Washington, where one receiving personal injuries as the re-

sult of negligence of another and during his life beginning an action therefor, but before trial dies as a result of injuries inflicted, and his widow, as administratrix, and in her own right, revives and carries on such action for personal injuries to judgment, an independent action for wrongful death will lie in favor of the widow in her individual capacity, and judgment was affirmed.

Since this decision, section 183 as quoted has been repealed, and now is as quoted in appellant's brief, requiring the administrator only to sue.

The controlling case under the law as it stands today is *Machek v. Seattle*, 118 Wash. 42, 203 Pac. 25, which is in line with *Puget Sound Traction, Light & Power Co. v. Frescoln*, *supra*. In *Machek v. Seattle*, *supra*, on page 47, the court says:

"The cases of *Mesher v. Osborne* and *Brodie v. Washington Water Power Co.*, *supra*, show the distinctions between the actions maintainable under paragraphs 183 and 194.

"Taking the exact situation which is presented by the complaint in this case, involving the death of a minor leaving no husband or child or children, but only dependent parents, we have this result, that the administrator could maintain an action for the benefit of the parents to recover the amount that would have been contributed by the deceased to their support, this amount not being limited to what

would have been furnished during decedent's minority only. Or, in the alternative, the parents themselves whether dependent or not, could maintain an action in their own name for the loss of services of the minor, from the time the loss was occasioned until such time as the minor would have arrived at majority. And in addition to either one of the foregoing actions under either paragraph 183 or 184, the administrator could maintain an action under paragraph 194 in favor of the dependent parents for the damages suffered by the deceased from the time of the injury until death. This action is entirely independent of actions under either paragraph 183 or paragraph 184, and could be concurrently maintained with actions under either one of those sections. A complaint stating a cause of action under this section should not have been dismissed, as the cause of action stated could not have been affected by the fact, if it were one, that an action had already been begun under either paragraph 183 or paragraph 184."

Discussing section 194, in *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193, the court said:

"Section 194 falls within the class of statutes to which the rules of liberal construction and interposition of terms applies, for no right of action is created by it. It merely recognizes a right of action that existed in a living person whether at common law or in virtue of some statute at the time of the death of the party. The right was in the 'person' at the time of death. Such a right is one in kind with a chose in action."

It is a general rule that the title to a chose in action and the right to sue thereon are in the administrator.

18 C. J. 902, Sec. 182 (4).

Under the pure survival statutes, where no new cause of action is created, but the cause of action of decedent is made to survive, the action must be brought by his personal representative.

17 C. J. 1265.

The original complaints were drawn under the authority of *Howe v. Whitman County*, but, after more mature consideration and after a close study of the decisions given in *Machek v. Seattle and Puget Sound Traction, Light & Power Company v. Frescoln*, *supra*, it was deemed advisable to file a second amended complaint.

No proceedings were brought up in the transcript why the second amended complaints were filed on February 15th. But it is significant that no objection was made to the court thereto, and the fact that both answers to the second amended complaints were filed by counsel thereafter on the 20th day of February leads to the inevitable conclusion that consent was obtained from the court that both sides could file their formal pleadings after the case was disposed of.

CONCLUSION

In conclusion, we wish to call the court's attention to the facts:

(a) That the existence of the path over the railroad track, and its open, notorious, and constant use by a great many people was overwhelmingly established by many disinterested witnesses.

(b) That the knowledge of the railroad company of the use of this path was clearly established in the face of the denial of the company.

(c) That the line of cars was switched or kicked, unattended, down the track and across a place where many people were crossing and in a populous city, without any warning of any character being given, and without any one in a position to see whether or not the track was clear.

(d) That the jury was fully and correctly instructed upon all questions of law.

(e) That the question of the plaintiff's capacity to sue was never raised in the court below, and can not be raised for the first time in this court on appeal.

We respectfully submit that there were no errors, and that the judgment of the court be affirmed.

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In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4049

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,
Plaintiff in Error

vs.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DIS-
TRICT OF WASHINGTON, NORTHERN DIVISION

Reply Brief of Plaintiff in Error

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TRICT OF WASHINGTON, NORTHERN DIVISION

Reply Brief of Plaintiff in Error

Because of the limited time allotted to plaintiff in error in which to present its contentions to the court by way of oral argument, and because of the importance of certain legal principles herein involved, plaintiff in error desires to submit a reply brief herein for the purpose of discussing certain

cases submitted by the defendant in error. For convenience in this brief, the parties will be referred to as designated in the court below.

The leading case cited by the plaintiff in support of his argument is that of *Roth v. Union Depot Company*, 13 Wash. 525. Even a cursory examination of the facts in said case and the principles of law laid down therein, will readily show that it does not support plaintiff's contentions, but on the contrary it upholds our view of the law of the state of Washington in cases of the same category as the ones at bar. In the first place, in the Roth case the place of accident was located in the streets of the city of Spokane, in the most populous part of the city, a place used, as one witness put it, "they used it just about the same as you would a sidewalk." There was also a high bluff with a sharp curve down grade near the place of accident, and the cars crossing the same were turned loose and allowed to go down the track around the curve, gathering great momentum as they proceeded. Furthermore, the cars were moving on both tracks, causing great confusion to the boy on the track, and in order to avoid one, he stepped in front of the other. It can readily be seen that the facts of the case are not at all analogous to those in the

cases at bar, where a long string of cars coupled together were only moved two feet by the closing of a couple of gaps in said string. In rendering his decision in said case, Judge Dunbar, on page 566 thereof, expressed his views to the effect that there was gross negligence on the part of the defendant; but no one reading the case could for one moment gather therefrom that the court would have held the defendant liable had there been a long string of cars on the track coupled together and caused to move backward a couple of feet by the coupling up of the engine, even at a place as extensively used in a populous part of the city as that shown in the Roth case. Even in that case it may be of interest to know that the Chief Justice rendered a strong dissenting opinion.

In the case of *Steele v. N. P. Ry.*, 21 Wash. 293, the plaintiff was injured at a public crossing, recognized as such by the defendant, in the city of Yakima, by a car making a flying switch, the car being on one track and the engine on the other, which tended to confuse anyone using the crossing. It is obvious that such a case is not at all applicable to the ones at bar.

Eskilden v. Seattle, 29 Wash. 583, is as far away in fact and principles from the cases at bar as are

the other cases cited in plaintiff's brief. The boy was injured from having his foot caught in a defective street of the defendant.

McConkey v. O. W. R. & N., 35 Wash. 55, is another case bearing out our theory of the law in the cases at bar, and we cannot but wonder why the same was cited by the plaintiff. McConkey was traveling over a trestle very frequently used by pedestrians, when he fell through a hole in same. It was conceded that he was a licensee, but nevertheless the court sustained a demurrer to the complaint. In speaking of the Roth case, and others cited by plaintiff, the court said:

"Wanton negligence was the controlling question in the case."

The court further said on pages 59 and 60:

"Assuming, however, that appellant was a licensee by reason of the fact that respondent had never actually prohibited him and others from traveling there, what new obligation did that fact create on the part of the respondent under the peculiar facts of this case? * * * Appellant was certainly not a licensee in the sense of being invited to cross the bridge. For his own benefit only, he assumed to cross because the privilege had not been denied. Under such circumstances, we think he must be held to have taken the situation as he found it. * * * We, therefore, think the com-

plaint, at most, shows that appellant was no more than a bare licensee, and in such case respondent owed him no duty, except to avoid willful, wrong and wanton carelessness and neglect. In our view, the complaint shows no such neglect to duty, and we believed it would be so viewed in the minds of all reasonable jurors."

Curtis v. O. W. R. & N., 36 Wash. 55, was a case in which cattle were killed while being driven over the defendant's tracks at a place where the defendant had built and maintained a grade crossing. The court found that the action of the defendant was wanton and willful. Thus it will be seen there was nothing in said case to support the contentions of the plaintiff herein.

Dotta v. N. P. Ry. Co., 36 Wash. 512, clearly sustains our contention as to what the law in the state of Washington is concerning a situation such as we find in the cases at bar. The plaintiff was injured while using a trestle as a footway in the city of Seattle, which was often used as a convenient way for pedestrians to industrial plants along the waterfront. It was held in said case that the use of the trestle was not forbidden by the defendant, but it was not encouraged by the manner of its construction. Judgment of non-suit was held proper, as the plaintiff was a trespasser, or at most a bare

licensee, to whom the defendant owed no duty except that of refraining from wanton or wilful injury. So in the cases at bar, the manner of construction of the grade at track No. 12 was such that the use of same was not encouraged. The grade was six or seven feet high rising abruptly from the ditch along the right of way (R. pp. 65, 71, 100). One of plaintiff's witnesses, a grown man, testified that there was quite an incline, that it was hard to get a wheelbarrow across the tracks, and that he always carried his wood over the track (R. p. 100). All the witnesses admitted there was a fence up along the right of way at various times, which positively negated any encouragement on the part of the defendant for the using of the track by pedestrians, and further negated any idea of invitation, express or implied, on the part of the defendant.

Again, we are led to wonder why the plaintiff should have cited the case of *Baker v. Tacoma & E. Ry.*, 44 Wash. 575. In that case an employee was killed at a place where the railroad tracks crossed a public street in the City of Tacoma. It was held that he could not recover. It is very evident that such case does not tend to sustain the contentions of the plaintiff in any way.

In *Vinette v. N. P. Ry.*, 47 Wash. 320, a child was killed by backing cars on defendant's switch track, and it was held that the parents could not recover. The court held that the railway company was not negligent, and even though people were in the habit of crossing the track at that place, there was no duty imposed upon the defendant to look out for them. It was also held that the plaintiffs could not make others bear the consequence of their own neglect. How the plaintiff in the cases at bar can absorb any comfort from the above case to support his theory, is more than we can fathom.

Grant v. O. W. R. & N., 54 Wash. 678, was a case in which a woman was injured by cars at a public crossing where no warning was given of the approach of the train. She was forced on the crossing involuntarily by a team of horses which had become frightened. Of course, it was the duty of the defendant to give proper signals and use due care at a public crossing. Such a case is not applicable to the ones at bar.

Gregg v. King County, 80 Wash. 204, was a case in which a boy was injured at a dock owned, controlled and operated by the defendant. He could not have been a trespasser at a public dock where

everybody was invited. It was also held in that action that imputed negligence would not apply, because the action was brought by the child. The case is not in point.

In the case of *Imler v. N. P. Ry.* 89 Wash. 527, a licensee was walking along the track and was killed by a train running against traffic, that is, a northbound train was running on a southbound track. It was held that the plaintiff could not recover, and that a judgment of non-suit at the close of plaintiff's case in the trial court was proper. Thus it will be seen that said case, if at all applicable to the ones at bar, sustains the defendant's contentions rather than those of the plaintiff.

In *Scharf v. Spokane I. E. Ry.*, 92 Wash. 561, the rule was well established that a naked licensee using the defendant's switch track, could not recover for injury sustained, nor could his personal representative or heirs recover for his death from such injuries, unless the negligence of the defendant was so gross as to amount to wilfulness or wanton recklessness. On page 565 of said case, the court in laying down the very rule which is the law of the state of Washington established beyond question in cases of this nature, said:

“The present case is governed by the well-settled rule that a naked licensee or trespasser who is injured upon the tracks or right of way of a railway company can recover for such negligence only as arises from wantonness or wilfulness on the part of the railway or its employees. As it is expressed in 3 Elliott, Railroads (2d ed.), § 1250:

“ ‘The better rule is that the licensee take his license subject to its concomitant perils, and the licensor, as a general rule, owes him no duty except to refrain from wilfully or wantonly injuring him, or to exercise ordinary and reasonable care after discovering him to be in peril.’

“In 2 Thompson, Negligence (2d ed.), §§ 1713, 1715, it is said:

“ ‘This doctrine is that where a trespasser or bare licensee exposes himself to the risk of being run over upon a railway track or in a railway yard, and is killed or injured, there can be no recovery against the railway company unless it is made to appear that the accident was the result of wilful misconduct, or of negligence or recklessness so gross as to amount, in theory of law, to wilful misconduct.’

“ ‘It seems entirely plain, from what has preceded, that the failure of the railway company to take special precautions beforehand in anticipation of the presence of trespassers upon the tracks, or in its yards—as by stationing a lookout or giving danger signals, or running at a diminished rate of speed, or using care to discover trespassers in positions of danger—can not be ascribed to it as gross,

reckless, wanton or wilful negligence within the meaning of the rule under consideration, since the great mass of holdings refuses to impute simple negligence by reason of such acts.' ”

“In *Kroeger v. Grays Harbor Construction Co.*, 83 Wash. 68, 145 Pac. 63, we say:

“ ‘The rule is that a defendant owes no duty of actual care, while a duty of vigilance or the highest degree of care is put upon one who, for his own purposes, goes upon the premises of another and puts himself in a place of danger.’ ”

“See, also, *Illinois Central R. Co. v. Eicher*, 202 Ill. 556, 67 N. E. 376; *Cannon v. Cleveland, C. C. & St. L. R. Co.* 157 Ind. 682, 62 N. E. 8; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 64 Fed. 823, 99 Fed. 369; *Huff v. Chesapeake & O. O. R. Co.*, 48 W. Va. 45, 35 S. E. 866; *Spicer v. Chesapeake & O. R. Co.*, 34 W. Va. 514; 12 S. E. 553, 11 L. R. A. 385.”

The law as announced in the last case and in the ones cited in our opening brief establishes beyond question that the plaintiff should have been nonsuited, and that the defendant should have received a judgment of dismissal or a directed verdict in the cases at bar.

We have taken up the Washington cases cited by defendant in his brief, and have briefly stated the facts and circumstances in each, and in no case cited have the contentions and theories of the plain-

tiff been upheld. Counsel says that in the Scharf case there was a path on either side of the track upon which the decedent might have traveled in safety. So there was in the cases at bar.

On pages 93 and 94 of the transcript of record in these cases, we find the testimony of Charles Roman, who was with the decedent at the time of the accident, upon this point. He admitted there was a path along either side of the track.

"Q. You didn't have to cross the track right at that place where you crossed it, did you?

"A. No.

"Q. But you and Edgar went just to the end, and as soon as you got to the end of the box-car you turned your wheelbarrow around and tried to get across.

"A. No.

"Q. Didn't you try to get across there?

"A. In just about a minute after we got there. I looked and listened before.

"Q. Of course, you stopped and looked and listened; but you didn't go very far from the end of the car before you started to go across?

"A. No.

"Q. When the cars bumped they didn't go very far, did they?

"A. No.

"Q. Just two or three feet?

"A. Just enough to run on his legs and back again.

"Q. And if you and Edgar had been down a couple of feet from there that car would not have got him?

"MR. BROWN: I object to that.

"THE COURT: Objection overruled.

"A. No."

In fact, all of the testimony of Charles Roman, the only eye witness to the accident, establishes beyond a doubt that defendant should have received a judgment of dismissal or a directed verdict in these cases. There was nothing left for the jury in said cases. The fact that under the law of the State of Washington the decedent was beyond peradventure of a doubt, a bare or naked licensee, was sufficient to entitle the defendant to a non-suit. Coupled with that conclusive defense, were the further facts of the gross negligence of the decedent and that of his parents. We can not find nor conceive of a case of contributory negligence so gross or so notorious, and a reading of the testimony of the father, mother and the young son, we feel sure

will convince the court that this case should never have been allowed to be submitted to a jury. From the example set for the decedent by his parents when accompanying him, we know that he did not exercise any degree of care in attempting to cross the track. Counsel lays stress upon the fact that the boys stopped, looked and listened. Of what benefit to them would that have been when the boy testifies they could not see the end of the string of cars? Even a child much younger than the decedent, should know, under those circumstances that it would be the utmost recklessness and folly to attempt to cross immediately behind the last car, when they had at least three hundred feet of clear track behind them. To permit any defendant to be mulcted in damages under such a state of facts, would be the grossest injustice. So upon either of two grounds, plaintiff should have been non-suited in these cases, and we submit that the court erred in not granting our motions.

It was to call the court's attention to the Washington cases cited by the plaintiff in his brief and to show that those cases among them applicable to the facts of the case at bar, are contrary to the contentions of the plaintiff, and that they support

our view of the law of the State of Washington, that this brief is submitted.

The inapplicability of the arguments advanced by counsel for the plaintiff on the other questions discussed in their brief, is so patent and obvious, that we will not take up the time of the court in discussing them. However, we do desire to call the court's attention to one case decided by this court and cited by the plaintiff as being adverse to our contention that the plaintiff had no capacity to sue. The case referred to is *Puget Sound Traction, Light & Power Company v. Frescoln*, 245 Fed. 301. In said case, the respondent commenced the action; before trial he died, and his wife as administratrix *and in her own right*, under section 194 Rem. & Bal. Code, was substituted as party plaintiff. Doubtless if she had not sued in her own right, the question of her capacity to sue would have been raised. She afterwards sued as the widow of the deceased under section 183, Rem. & Bal. Code, which she had a right to do, but said section was amended by the laws of 1917, which now provide that such actions must be maintained by the personal representative. Thus it will be readily seen that all this court decided in that case was that an action under section 194 was not a bar to an action under section 183.

However, the question of the proper parties plaintiff in cases of this nature has now been definitely settled by the case of *Howe v. Whitman County*, 120 Wash. 247, cited and quoted in our opening brief, that actions must be brought in the representative capacity under section 183 and in personal capacity under section 194, and it is unnecessary to further discuss it.

Respectfully submitted,

W. H. BOGLE,
F. T. MERRITT,
LAWRENCE BOGLE,
LANE SUMMERS,
E. I. JONES,

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Partners Under the Firm Name of GEORGE S. SPIROPLOS & BROS., Bankrupts.

CHARLES BODEAU, as Trustee in Bankruptcy of the Estate of GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS,

Appellants,

vs.

GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS, and GUST SPIROPLOS,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

FILED

JUL 16 1923

F. D. MONKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of GEORGE S. SPIROPLOS, MIL-
TIADES SPIROPLOS and GUST SPIR-
OPLOS, Partners Under the Firm Name of
GEORGE S. SPIROPLOS & BROS., Bank-
rupts.

CHARLES BODEAU, as Trustee in Bankruptcy
of the Estate of GEORGE S. SPIROPLOS,
MILTIADES SPIROPLOS and GUST
SPIROPLOS,

Appellants,

vs.

GEORGE S. SPIROPLOS, MILTIADES SPIR-
OPLOS, and GUST SPIROPLOS,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Oregon.

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Names and Addresses of Attorneys of Record.

A. A. SMITH, Baker, Oregon, for the Appellant.

JOHN L. RAND, Salem, Oregon, and GRIFFITH,
LEITER & ALLEN, Electric Building, Port-
land, Oregon, for the Appellees.

In the District Court of the United States for the
District of Oregon.

In the Matter of GEORGE SPIROPLOS, MILTI-
ADES SPIROPLOS, and GUST SPIRO-
PLOS, Bankrupts.

Citation.

United States of America,—ss.

The President of the United States to George Spiro-
plos, Miltiades Spiroplos, and Gust Spiroplos,
GREETING:

You and each of you are hereby cited and admon-
ished to appear in the United States Circuit Court
of Appeals for the 9th Circuit, in the city of San
Francisco, on the 30th day of Oct., 1922, pursuant
to the appeal duly obtained and filed in the Clerk's
Office of the District Court of the United States,
for the District of Oregon, wherein you, as bank-
rupts are appellees and Charles Bodeau, Trustee, is
the appellant, wherein Charles Bodeau, Trustee in
Bankruptcy of the Estate of George Spiroplos, Mil-
tiades Spiroplos, and Gust Spiroplos, is the appel-
lant, to show cause, if any there be, why the order
and decree in said appeal mentioned should not be

reversed and corrected and why speedy justice should not be done to the parties in that behalf and to do and receive that may appertain to justice to be done in the premises.

WITNESS the Honorable R. S. BEAN, United States Judge for the District of Oregon, on the 3d day of Sep., in the year of our Lord one thousand nine hundred and twenty-two.

R. S. BEAN,
Judge. [1*]

State of Oregon,
County of Multnomah.

Due service of the within citation is hereby accepted in Multnomah County, this 30th day of September, 1922, by receiving a copy thereof, duly certified to as such by A. A. Smith, attorney for appellant.

GRIFFITH, LEITER & ALLEN,
Attorneys for Bankrupts.

[Endorsed]: No. B-5595. In the District Court of the United States for the District of Oregon. In the Matter of the Estate of George Spiroplos et al., Bankrupts. Citation. U. S. District Court, District of Oregon. Filed Sep. 30, 1922, at 11:30 o'clock A. M. G. H. Marsh, Clerk. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
District of Oregon.

July Term, 1920.

BE IT REMEMBERED, that on the 30th day of October, 1920, there was duly filed in the District Court of the United States for the District of Oregon a petition for adjudication of bankrupt, with schedules attached, in words and figures as follows, to wit: [3]

Partnership Petition.

To the Honorable ROBERT S. BEAN and to the
Honorable CHARLES E. WOLVERTON,
Judges of the District Court of the United
States for the District of Oregon:

The petition of George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos respectfully represents:

That your petitioners, George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos, have been partners under the firm name of George S. Spiroplos & Bros., having their principal place of business at Home, Oregon, in the County of Baker, and District and State of Oregon, for the greater portion of the six months next immediately preceding the filing of this petition; that the said parties owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as

is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked "A" and verified by their oaths, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed marked "B" verified by their oaths contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And the said George S. Spiroplos further states that the schedule hereto annexed, marked "C" verified by his oath contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked "D," verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property, as are required by the provisions of said acts.

And said Miltiades Spiroplos further states that the schedule hereto annexed, marked "E," verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the

names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed marked "F," verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts. [4]

And said Gust Spiroplos further states that the schedule hereto annexed marked "G," verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed marked "H," verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said — further states that the schedule hereto annexed marked "J," verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed marked "J," verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further state-

ments concerning said property as are required by the provisions of said acts.

WHEREFORE, your petitioners pray that the said partnership, and your petitioners as individuals, may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

GEORGE S. SPIROPLOS,
MILTIADES SPIROPLOS,
GUST SPIROPLOS,

Petitioners.

JOHN L. RAND,
Attorney for Petitioners.

United States of America,
District of Oregon,
County of Baker,—ss.

We, George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of our knowledge, information and belief.

GEORGE S. SPIROPLOS,
MILTIADES SPIROPLOS,
GUST SPIROPLOS,

Petitioners.

Subscribed and sworn to before me this 21 day of Oct., 1920.

[Seal]

J. L. SOULE,

Notary Public for Oregon.

My Commission expires April 29, 1921. [41½]

SCHEDULE B—STATEMENT OF ALL PROPERTY OF BANKRUPT.

Schedule B-1.

REAL ESTATE.

Location and description of all real estate owned by debtor, or held by him.	Encumbrances thereon, if any, and dates thereof.	Statement of particulars re- lating thereto. \$	Estimated value. cts
Flick Ranch at Home, Ore. described as follows: Lot 2, W $\frac{1}{2}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$ and SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 15 and Lots 1, 2 and 3, and E $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 22, all in Tp. 12 S. R. 45 E. W. M. in Baker County, Ore.	Incumbered by Mort- gage to First National Bank of Baker City, Oregon, for \$71000.00, Dec. 10th, 1919.	This real estate mortgage was given to secure the pay- ment of certain notes inadequately secured by chat- tel mortgages and 'covers other prop- erty hereinafter more particularly described.	20000.00

George S. Spiroplos
Homestead, about six miles
from Home, Ore. described
as follows.

N $\frac{1}{2}$ of SW $\frac{1}{4}$, W $\frac{1}{2}$ and SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 22, E $\frac{1}{2}$ of NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 27, all in Tp. 11 S. R. 45 E. W. M. in Baker County, Ore.	Covered by mortgage above described.	Same as stated above.	1000.00
--	---	--------------------------	---------

Total 21000.00

GEORGE SPIROPLOS,
MILTIADES SPIROPLOS,
GUST SPIROPLOS,

Petitioners.

This schedule must be executed in triplicate. [5]

Schedule B-4.

PROPERTY IN REVERSION, REMAINDER
OR EXPECTANCY, INCLUDING PROP-
ERTY HELD IN TRUST FOR THE
DEBTOR OR SUBJECT TO ANY POWER
OR RIGHT TO DISPOSE OF OR TO
CHARGE.

(N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed or assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the persons to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, so far as known to the debtor.)

General Interest	Particular Description	Supposed Value of Interest in land
Interest in land	None.	
	GEORGE SPIROPLOS, MILTIADES SPIROPLOS, GUST SPIROPLOS,	
	Petitioners.	[5½]

OATH TO SCHEDULE B.

United States of America,
District of Oregon,
County of Baker,—ss.

On this 20th day of October, A. D. 1920, before me personally came George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos, the persons mentioned in and who subscribed to the foregoing Schedule (marked B 1, 2, 3, 4, 5, 6), and who, being

by me first duly sworn did declare the said schedule to be a statement of all their Estate, both real and personal, in accordance with the acts of Congress relating to Bankruptcy.

GEORGE S. SPIROPLOS.
MILTIADES SPIROPLOS.
GUST SPIROPLOS.

Subscribed and sworn to before me this 20th day of October, A. D. 1920.

[Seal]

J. L. SOULE,

Notary Public for Oregon.

(District Judge, Referee, U. S. Commissioner, or Notary Public.)

My Commission expires April 29, 1921.

Petitioner's Attorney cannot act as Notary, etc.

To be attached to Schedule B after execution before proper officer. This oath can be taken before a U. S. Judge, Referee, U. S. Commissioner or Notary Public.

Filed October 30, 1920, 12:15 o'clock P. M. G. H. Marsh, Clerk. [6]

AND AFTERWARDS, to wit, on the 30th day of October, 1920, there was duly filed in said court, an adjudication of bankrupt, in words and figures as follows, to wit: [7]

In the District Court of the United States for the
District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE SPIROPLOS, MIL-
TIADES SPIROPLOS, and GUST SPI-
ROPLOS, Individually and as Partners Under
the Firm Name of GEORGE S. SPIROPLOS
& BROS., Bankrupts.

Adjudication of Bankruptcy.

At Portland, in said District, on the 30th day of
October, A. D. 1920, before the Honorable Charles E.
Wolverton, Judge of said court in bankruptcy, the
petition of George S. Spiroplos, Miltiades Spiro-
plos, and Gust Spiroplos, doing business under the
firm name of George S. Spiroplos & Bros., that
George S. Spiroplos, Miltiades Spiroplos and Gust
Spiroplos, individually and as said partnership of
George S. Spiroplos & Bros., be adjudged bankrupt,
within the true intent and meaning of the Acts of
Congress relating to bankruptcy, having been heard
and duly considered, the said George S. Spiroplos,
Miltiades Spiroplos, and Gust Spiroplos, individu-
ally and as said partnership, are hereby declared
and adjudged bankrupts accordingly.

WITNESS the Honorable CHARLES E. WOL-
VERTON, Judge of the said Court, and the seal
thereof, at Portland, in said district, on the 30th
day of October, A. D. 1920.

[Seal]

G. H. MARSH,
Clerk.

By L. S. Rogers,
Deputy Clerk.

[Endorsed]: No. B-5595. United States District Court, District of Oregon. In the Matter of George S. Spiroplos & Bros. et al., in Bankruptcy. Adjudication of Bankruptcy. Filed and Entered at 12:30 o'clock P. M., this 30th day of October, A. D. 1920. G. H. Marsh, Clerk. By L. S. Rogers, Deputy Clerk. [8]

AND AFTERWARDS, to wit, on the 30th day of April, 1921, there was duly filed in said court separate petitions of bankrupts for discharge, in words and figures as follows, to wit: [9]

In the District Court of the United States for the District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Copartners as SPIROPLOS BROTHERS, Both Individually and as Copartners, Bankrupts.

Petition of Gust Spiroplos for Discharge.

To the Honorable ROBERT S. BEAN and C. J. WOLVERTON, Judges of the District Court of the United States for the District of Oregon.

Gust Spiroplos, of Home, in the County of Baker, and State of Oregon, in said District, respectfully represents that on the 30th day of October, 1920, last past, he was duly adjudged bankrupt under the

Acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

WHEREFORE, he prays that he may be decreed by the Court to have a full discharge from all debts provable against his estate, both individual and as a copartner, under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this 4th day of April, A. D. 1921.

GUST SPIROPLOS,
Bankrupt.

State of Oregon,
County of Baker,—ss.

Huntington, Oregon, April 23, 1921.

Personally appeared Gust Spiroplos and made oath that the foregoing statement by him subscribed is true.

Before me,

[Seal]

W. J. WOODS,
Notary Public for Oregon.

My Commission expires August 25, 1921.

Filed April 30, 1921, at 11:05 A. M. G. H. Marsh,
Clerk. [10]

In the District Court of the United States for the
District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE SPIROPLOS,
MILTIADES SPIROPLOS and GUST
SPIROPLOS, Copartners as SPIROPLOS
BROTHERS; Both Individually and as Co-
partners, Bankrupts.

Petition of George Spiroplos for Discharge.

To the Honorable ROBERT S. BEAN and C. J.
WOLVERTON, Judges of the District Court
of the United States for the District of Oregon.

George Spiroplos, of Home, County of Baker, and
State of Oregon, in said District, respectfully rep-
resents that on the 30th day of October, 1920, last
past, he was duly adjudged bankrupt under the Acts
of Congress relating to bankruptcy; that he has
duly surrendered all his property and rights of
property, and has fully complied with all the re-
quirements of said acts and of the orders of the
court touching his bankruptcy.

WHEREFORE, he prays that he may be de-
creed by the Court to have a full discharge from all
debts provable against his estate, both individual
and as a copartner, under said bankrupt acts, except
such debts as are excepted by law from such dis-
charge.

Dated this 4th day of April, A. D. 1921.

GEORGE SPIROPLOS,
Bankrupt.

State of Oregon,
County of Baker,—ss.

Baker, Oregon, April 23, 1921.

Personally appeared George Spiroplos and made oath that the foregoing statement by him subscribed is true.

Before me,

[Seal]

JOHN L. RAND,

Notary Public for Oregon.

My Commission expires Dec. 21, 1923.

Filed April 30, 1921, at 11:05 A. M. G. H. Marsh,
Clerk. [11]

In the District Court of the United States for the
District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE SPIROPLOS,
MILTIADES SPIROPLOS and GUST
SPIROPLOS, Copartners as SPIROPLOS
BROTHERS, Both Individually and as Co-
partners, Bankrupts.

Petition of Miltiades Spiroplos for Discharge.

To the Honorable ROBERT S. BEAN and C. J.
WOLVERTON, Judges of the District Court
of the United States for the District of Oregon.
Miltiades Spiroplos, of Home, County of Baker,

and State of Oregon, in said District, respectfully represents that on the 30th day of October, 1920, last past, he was duly adjudged bankrupt under the Acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

WHEREFORE, he prays that he may be decreed by the Court to have a full discharge from all debts provable against his estate, both individual and as a copartner, under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this 4th day of April, A. D. 1921.

MILTIADES SPIROPLOS,
Bankrupt.

State of Oregon,
County of Baker,—ss.

Huntington, Oregon, April 13, 1921.

Personally appeared Miltiades Spiroplos and made oath that the following statement by him subscribed is true.

Before me,

[Seal]

W. J. WOODS,

Notary Public for Oregon.

My Commission expires August 25, 1921.

Filed April 30, 1921, at 11:05 A. M. G. H. Marsh,
Clerk. [12]

AND AFTERWARDS, to wit, on the 11th day of July, 1921, there was duly filed in said court specifications of objections to discharge, in words and figures as follows, to wit: [13]

In the District Court of the United States for the District of Oregon.

In the Matter of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Bankrupts.

Specifications of Grounds of Opposition to Bankrupts' Discharge.

Comes now Charles Bodeau, the duly qualified and acting trustee of the estate of the above bankrupts and, having been authorized and requested by the creditors of the said bankrupts at a meeting called and held for that purpose prior hereto to appear herein and file specifications of grounds of opposition to the discharge of the said bankrupts and to do such other and further acts as may be necessary to properly present for decision the matters covered by said specifications, the said Trustee does hereby oppose the granting of a discharge to the bankrupts above named from their debts and for grounds of such opposition hereby files the following

SPECIFICATIONS.

I.

(Omitted by direction of praecipe for transcript.)

II.

(Omitted by direction of praecipe for transcript.)

III.

That the bankrupts above named duly filed as required by law their petition to be adjudicated bankrupts and as a part thereof included schedules purporting to show all property owned by them both individually and as copartners, but that said schedules purporting to show the property owned by the said bankrupts individually and as copartners failed to include [14] eight head of cattle, consisting of three cows, one steer, three or four years old, two yearlings and two calves, which said cattle and all thereof was the property either of the said bankrupts as copartners or of the said George S. Spiroplos, one of said bankrupts, individually; the said bankrupts failed to include in said schedule a McCormick mower which was owned by them; and a gas engine, all of above-described property having since their adjudication as bankrupts been sold by the said bankrupts and the proceeds therefrom appropriated to their own use and benefit, and at the time of the filing of the said petition to be adjudicated bankrupts, which included the schedules as aforesaid, the said bankrupts and each thereof well knew that neither the said cattle above described nor the said mowing machine nor the said gas engine were included therein and the said bankrupts wilfully, fraudulently and purposefully failed to include the said property above described in their said schedule for the purpose of defrauding the creditors of said bankrupts and for the purpose of appropriating the said property to their own use and benefit, and the said bankrupts wilfully, and

fraudulently concealed the property above described and all thereof from the Trustee in Bankruptcy and at all times failed and refused to disclose to the said Trustee the property above described or to turn the same over to him or to turn the proceeds of said property over to the said Trustee and the said bankrupts since their adjudication have sold and disposed of the property above described and appropriated the proceeds thereof, and the said property was sold or disposed of by the said bankrupts before the said Trustee had any knowledge of the existence of said property or that the same belonged to the said bankrupts, either as partners or individually, and the said Trustee demanded the proceeds from said sales to be turned over to him as Trustee, but the said bankrupts have at all times failed, neglected and refused to turn over said proceeds or any part thereof to the said Trustee. [15]

IV.

That at the time of filing the said schedules showing property owned by said bankrupts the said bankrupts were the owners of the following described premises, to wit:

The East half (E. $\frac{1}{2}$) of the Northeast quarter (NE. $\frac{1}{4}$) of Sec. 12, Tp. 12 S., R. 44 E., W. M., and Lot 1, Northeast quarter (NE. $\frac{1}{4}$) of the Northwest quarter (NW. $\frac{1}{4}$); South half (S. $\frac{1}{2}$) of the Northwest quarter (NW. $\frac{1}{4}$); Southwest quarter (SW. $\frac{1}{4}$) of the Northeast quarter (NE. $\frac{1}{4}$); and the Northwest quarter (NW. $\frac{1}{4}$) of the Southeast quarter (SE. $\frac{1}{4}$) of Sec. 7, Tp. 12 S., R. 45 E., W. M.

That the real property above described was not included in the list of assets owned by the said bankrupts as shown by the schedules filed by them, although at said time and at all times since the — day of Nov. 1919, the said bankrupts have been the owners of the real premises above described and the same were a part of the assets of the said bankrupts, and the said bankrupts wilfully and fraudulently failed and neglected to include the premises above described in the assets belonging to the said bankrupts, and wilfully and fraudulently concealed from the Trustee in Bankruptcy and from the creditors of the said bankrupts that they were the owners of the said real property or had any interest therein.

V.

That on the — day of June, 1921, the Hon. F. L. Hubbard, the duly appointed, qualified and acting referee to whom the above matter had been referred, duly made and entered an order requiring the said bankrupts to turn over to the Trustee herein all of the books, records and documents showing transactions of the said partnership, and the said bankrupts have wholly failed and neglected and refused to turn over certain books and ledgers showing accounts between them and one John Demas who claims to be the owner of certain property actually belonging to the said bankrupts and which said books the said bankrupts claim show that the said John Demas has paid all indebtedness owing by him to the said bankrupts, and that the said John Demas is the owner of the said property,

and showing all transactions between themselves and men [16] associated with them in the sheep business and such books, the exact description of which is wholly unknown to the Trustee herein have not been turned over to the said Trustee, and the said Trustee has had no opportunity to examine the same or become familiar with the transactions covered by the records and books which have not been turned over. That certain books and memoranda have been turned over but that no part thereof cover the transactions above referred to, and that the said bankrupts have wholly failed and neglected to turn over to the said Trustee any records showing in any satisfactory manner the transactions between the said bankrupts and the said John Demas and other associates with the bankrupts in the business in which they were engaged, and the said order above referred to was duly served upon the said bankrupts and they and each of them have due notice thereof, and the said bankrupts have wholly failed to turn over to the said Trustee a complete set of books or memoranda or documents or records of any description showing in a complete manner the transactions and business dealings of the said partnership, and that the records which have been turned over are wholly incomplete and insufficient for the purpose of examining into such transactions or learning the facts relative to the same although the said bankrupts claim to have kept a complete set of books showing all of their transactions, but such books if kept, the said bankrupts have wilfully failed, neglected

and refused to turn over to the said Trustee at any time prior or subsequent to the making of the said order.

VI.

That the said bankrupts within four months of the date that the petition to be adjudicated as bankrupts was filed, transferred and assigned to one John Demas an automobile, and at the time of the attempted transfer of the said automobile to the said John Demas the said bankrupts were insolvent and the said automobile was transferred for the purpose of giving to the said John Demas a preference, and the said automobile was not included by the said bankrupts in the schedules of property owned by them and filed with the said petition, and the assignment of the said automobile to the said John Demas as aforesaid constituted a preference and was for the purpose of paying [17] an antecedent debt or a portion thereof, and the said automobile as a matter of law should have been included in the said assets of the said bankrupts because of the fact that the same had been transferred within four months of the adjudication of the said bankrupts as bankrupts, and the said bankrupts knowingly and with fraudulent intent failed to include the said automobile in the said assets contained in the said schedules filed by said bankrupts.

VII.

That the said George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos on or about the 20th day of October, 1920, before one J. L. Soule, a duly appointed and qualified Notary public for the State

of Oregon, in Baker County, Oregon, and in the District of Oregon, duly subscribed and swore to schedule "B" of their petition to be adjudged bankrupts, which said petition was filed in the U. S. District Court of the District of Oregon on October 30, 1921, and on or about the said 20th day of October, 1920, the said George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos after being duly sworn declared that the said schedule "B" was a statement of all of their estate both real and personal, and at the said time the said George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos duly subscribed to the said oath and at said time they and each of them knew that the said schedule did not contain eight head of cattle, which belonged at said time to the said bankrupts or to the said George S. Spiroplos individually, and they and each of them knew that the said schedule did not contain a statement of their ownership of a gas engine or of a McCormick mower or a disk harrow or of a debt owing by Mrs. — Bastian to the said partnership in the sum of \$50.00 for the balance due on the purchase price of an old gasoline engine or of about 1200 posts on what is known as the Miller ranch, or of the following described premises, to wit:

East half (E.1/2) of the Northeast quarter (NE.1/4) of Sec. 12, Tp. 12 S., R. 44 E., W. M., and Lot 1; Northeast quarter (NE.1/4) of the Northwest quarter (NW.1/4); South half (S.1/2) of the Northwest quarter (NW.1/4); Southwest quarter (SW.1/4) of the Northeast quarter (NE.1/4) and the Northwest quarter (NW.1/4) of the Southeast quarter (SE.1/4) of Sec. 7, Tp. 12 S., R. 45 E., W. M.

And at said time the said George S. Spiroplos, Miltiades [18] Spiroplos and Gust Spiroplos, and each of them knew that the said partnership owned all of the above property and that the same was not included in said schedule and that the said schedule "B" as aforesaid was not a full and complete statement of all the real and personal property owned by the said bankrupts, and that the said bankrupts with full and complete knowledge of the fact that the said schedule did not contain all of their real and personal property, wilfully subscribed and swore to the said schedule and wilfully swore that the said schedule contained a full, true and correct statement of the real and personal property owned by them.

VIII.

(Omitted by direction of praecipe for transcript.)

IX.

That the said George S. Spiroplos, Miltiades Spiroplos, and Gust Spiroplos, Bankrupts above named and one John Demas for the purpose of defrauding the creditors of the said bankrupts entered into an agreement and conspiracy under and by virtue of which certain property belonging to the said bankrupts was to be claimed by the said John Demas as his own property the time of said agreement or said conspiracy being unknown to the Trustee herein and in accordance and under and by virtue of said conspiracy the said John Demas claims to be the owner of a certain gas engine which at the time of the adjudication of the said bank-

rupts as bankrupts was their property, claims to be the owner of a mowing machine, which at the said time was their property and claims to be the owner of the following described premises, to wit:

East half (E. $\frac{1}{2}$) of the Northwest quarter (NE. $\frac{1}{4}$) of Sec. 12, Tp. 12 S., R. 44 E., W. M. and Lot 1; Northeast quarter (NE. $\frac{1}{4}$) of the Northwest quarter (NW. $\frac{1}{4}$); South half (S. $\frac{1}{2}$) of the Northwest quarter (NW. $\frac{1}{4}$); Southwest quarter (SW. $\frac{1}{4}$) of the Northeast quarter (NE. $\frac{1}{4}$) and the Northwest quarter (NW. $\frac{1}{4}$) of the Southeast quarter (SE. $\frac{1}{4}$) of Sec. 7, Tp. 12 S., R. 45 E., W. M.

Which was their property, and claims to be the owner of various other items of property which was the property of said bankrupts but which are at this time unknown to the Trustee but all of said property at the time of the adjudication of the said bankrupts [19] as bankrupts was their property and the said John Demas at no time had any right, title or interest therein or any portion thereof and the said conspiracy and arrangement between said parties was for the purpose on the part of the said bankrupts to defraud the creditors of the said bankrupts and prevent said creditors from obtaining the said property or the proceeds therefrom and to enable the said bankrupts to conceal the said property from the Trustee and from the creditors and to appropriate the same to their own use and the agreement was knowingly, willfully and fraudulently entered into by the said bankrupts for the sole purpose of defrauding the creditors thereof

and the said bankrupts by means of said conspiracy and agreement have willfully and unlawfully attempted to sell and dispose of the property above named and to wilfully and unlawfully appropriate the proceeds thereof to their own use and to wrongfully and unlawfully prevent said property or the proceeds thereof to be turned over to the Trustee and for the purpose of hindering the creditors of the said bankrupts and prevent them from obtaining the said property or the proceeds thereof to be applied upon the obligations of the said bankrupts.

WHEREFORE Trustee prays that the bankrupts be denied a discharge.

CHARLES BODEAU,

Trustee.

A. A. SMITH,

Attorney for Trustee, Residing at Baker, Oregon.

State of Oregon,

County of Baker,—ss.

I, Charles Bodeau, being first duly sworn, say that I am the Trustee above named. That I have read the above and foregoing specifications of opposition to the discharge of the bankrupts, know the contents thereof and the same is true as I verily believe.

CHARLES BODEAU.

Subscribed and sworn to before me this 9th day of July, 1921.

[Seal]

A. A. SMITH,

Notary Public for Oregon.

My commission expires Mar. 16, 1925.

Filed July 11, 1921. G. H. Marsh, Clerk. [20]

AND AFTERWARDS, to wit, on the 8th day of May, 1922, there was duly filed in said court an answer of bankrupts to specifications of objections to discharge, in words and figures as follows, to wit: [21]

In the District Court of the United States for the District of Oregon.

In the Matter of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Copartners, Doing Business Under the Firm Name and Style of SPIROPLOS BROTHERS, Bankrupts.

Answer of Bankrupts to Specification of Grounds of Opposition to Bankrupts' Discharge.

Come now the above-named George Spiroplos, Miltiades Spiroplos and Gust Spiroplos, copartners, doing business under the the firm name and style of Spiroplos Brothers, bankrupts, and for answer as bankrupts to the objections of Charles Bodeau, Trustee in bankruptcy, heretofore filed herein and to the matters and things therein alleged, admit, deny and allege, as follows:

I.

As to the allegations contained in what is designated therein as specification I, said bankrupts say: That the said allegations are so indefinite and uncertain that said bankrupts are not apprised and do not know to what said allegations refer and therefore said bankrupts move that said allegations be stricken out for the reason that the same are so

indefinite and uncertain that they do not apprise the bankrupts of the charges intended to be alleged or to any matter or thing which said bankrupts are required to answer.

II.

Answering the allegations contained in paragraph II, said bankrupts deny that on the 5th day of May, 1921, the Referee herein made an order directing said bankrupts or either of them except George Spiroplos, to appear at the office of the Referee on the 12th day of May, 1921, or that any notice was ever served on any of said bankrupts, except George Spiroplos, to appear at any time and neither of said bankrupts, except George Spiroplos, knew that any hearing was set for said time. Said bankrupts admit that a copy of said order was mailed to the bankrupt, George Spiroplos, at Home, Oregon, and was received by him on or about May 7th, [22] 1921. That at said time the said George Spiroplos, bankrupt, was in charge of a shearing outfit belonging to Robert S. Stanfield, and could not, without great loss to said Stanfield, leave said plant and immediately upon receiving the letter from Hon. F. L. Hubbard, the Referee, notifying him that a hearing was to be held on the 12th day of May, 1921, at Baker, Oregon, the said George Spiroplos wrote a letter to his counsel, John L. Rand, dated May 7th, asking his said counsel to see the said Referee and, if possible, get the hearing continued to May 15th, at which time the shearing would be finished. That said counsel was not in Baker on the receipt of said letter and did not return to Baker until the morning

of May 14th, 1921, and therefore did not receive nor answer the letter so written to him by said George Spiroplos. That not receiving any reply from his said counsel and being unable to leave said shearing plant at Home, Oregon, which is situated a distance of sixty-five miles from Baker, Oregon, the said George Spiroplos believed that said hearing had been postponed as he had requested to have done and for that reason did not come to Baker at said time. That the said John L. Rand returned to Baker, Oregon, on the morning of May 14th, 1921, and upon his return received the letter written to him by said George Spiroplos, and as said bankrupts are informed and believe and therefore allege, he attempted to get into communication with Mr. Hubbard, and under date of May 14th, wrote a letter to Mr. George Spiroplos, as follows:

“Mr. George Spiroplos,
Home, Oregon.

“Dear Mr. Spiroplos:

“I received your letter of May 7th, this morning stating that Mr. Hubbard had notified you to come in on May 12th, and asking me to see you and find out if it was necessary for you to come in. I left here on May 3d and did not return until last night, hence my delay in answering your letter. Mr. Hubbard is not in town so I cannot find out for what he wanted you to come in.” [23]

The letter was written and mailed to said George Spiroplos by his said counsel on May 14th, 1921, and was received a short time thereafter by him at Home, Oregon. That the failure of said George

Spiroplos to appear at the said time set as aforesaid was wholly the result of a misunderstanding and through the belief upon his part that the hearing had been postponed and not otherwise.

III.

Answering paragraph III of said specifications the bankrupts deny that said bankrupts failed to include in the petition and schedules filed by them any cattle, or other property belonging to them, as partners or as individuals or otherwise, and said bankrupts allege that said cattle and said McCormick Mower and the said gas engine, and each and every article mentioned in said specification III was not their property at the time petitions in bankruptcy were filed and were properly and lawfully and in good faith omitted from said schedules on account of not belonging to them and not being property which they had a right to insert in said schedules.

IV.

Answering paragraph IV of said specifications the said bankrupts deny that they were ever the owners of any part of the real property mentioned in said paragraph IV, or ever had any interest therein, and allege that the said property and the whole thereof was the property of one John Demas, who held both the legal and equitable title thereto and the full beneficial interest therein.

V.

Answering paragraph V of said specifications the bankrupts allege that they kept no books of account, records or documents showing the transac-

tions of their said partnership, until [24] on or about November, 1919, except check-books, and a small book showing the time and wages of employees. That about the 1st day of November, 1919, the bankrupts commenced to be involved in business difficulties at which time they took said small book, showing the time of said employees, and all of their bank-books, checks and other documents and delivered them to J. L. Soule, and at said time employed the said J. L. Soule to keep a full and accurate account of all their business transactions and ever after said time their accounts were kept in full by the said J. L. Soule and all of said books so kept by him are in Baker, and have been delivered to A. A. Smith, who is representing both the creditors herein, as will appear from the records herein, and also the Trustee in Bankruptcy, and said books and records are now in his possession and have been for some time prior hereto. These bankrupts further allege that upon a hearing held herein on Tuesday, June 7th, 1921, at which time the said George Spiroplos presented himself for examination before the Referee, no demand was made upon the said George Spiroplos for any books of account but Mr. Soule, who appeared at said time as a witness before said Referee, was requested to produce and deliver the books of said partnership and in response thereto did deliver said books to said A. A. Smith, as above stated.

VI.

Answering paragraph VI of said specifications the bankrupts allege that they do not now and

never did have any interest whatsoever in the automobile mentioned in said paragraph and specification VI. That the same was the sole and separate property of John Demas as was well known to the Trustee in Bankruptcy and his attorney at the time said specifications and objections were filed and the true history and a statement of the transaction involved in connection with said automobile was testified to and proved at the hearing before the Referee held on June 7th, 1921. [25]

VII.

Answering the allegations of paragraph VII of said specifications said bankrupts deny all of the allegations contained in said paragraph, except they allege that Mrs. Minnie Bastian had not paid them in full for the gasoline engine and posts mentioned therein all that they believed she should pay, but that said Minnie Bastian had always disclaimed that she owed anything thereon and said bankrupts had, for that reason, abandoned any contention upon their part that anything was due them from her. That no sum has been paid by her thereon since and at the time said schedules were prepared the bankrupts had forgotten said transaction.

VIII.

Answering paragraph VIII of said specifications the said bankrupts deny each and every allegation contained therein.

IX.

Answering paragraph IX of said specifications

the said bankrupts deny each and every allegation contained therein.

Further answering said objections to the discharge of said bankrupts said bankrupts allege:

I.

That during all of the time mentioned in the specifications and grounds of opposition to the bankrupts' discharge herein the bankrupts herein lived at Home, Oregon, a point sixty-five miles from Baker. That during most of said time they were away from Home, Oregon, at points further away and in the mountains, as the employees of Robert S. Stanfield, in charge of sheep belonging to said Stanfield. That neither of said bankrupts, except George Spiroplos, has ever been notified or requested to appear before the Referee, at any time or place. That neither of said bankrupts have taken any part in said bankruptcy proceedings since they were adjudicated bankrupts, except the said George Spiroplos. That no notice or demand has ever been served or made on either Miltiades Spiroplos or Gust Spiroplos. That the said George [26] Spiroplos has come to Baker, as will appear from the records of the Referee, herein, on numerous occasions when requested by the Referee, or by the attorney for the Trustee, or by the creditors. That he has done so at great expense to himself. That his expenses have only been paid him on one occasion. That at all other times he has paid his own expenses and in each instance has traveled a distance of not less than sixty-five miles each way in coming and going to attend hearings when requested. That he has never intentionally

or wilfully failed to appear when notified. That if he had understood that it was necessary for him to have been here on May 12th, 1921, he would have been here but he believed at said time that the matter had been postponed because he did hear from counsel, as hereinbefore stated.

II.

Said bankrupts further allege that none of the charges made by the Trustee in Bankruptcy are true, and that all of the property belonging to said bankrupts, either as partners or as individuals, are included in their said schedules and that all of the matters and things in said schedules alleged are true.

Wherefore said bankrupts pray that they may be discharged as in their petition in bankruptcy prayed.

JOHN L. RAND,

Attorney for Said Bankrupts. [27]

State of Oregon,

County of Baker,—ss.

I, George Spiroplos, being first duly sworn, say: I am one of the bankrupts in the foregoing proceedings; that I have heard the foregoing answer of said bankrupts read and know the contents thereof and that the same is true as I verily believe.

GEORGE S. SPIROPLOS.

Subscribed and sworn to before me this 10th day of August, 1921.

[Seal]

JOHN L. RAND,

Notary Public for Oregon.

My Commission expires December 21st, 1923.

State of Oregon,
County of Baker,—ss.

Due service of a duly certified copy of the within answer is hereby admitted this 30th day of August, 1921.

A. A. SMITH,
Attorney for Trustee.

Filed August 30, 1921. Forrest L. Hubbard, Special Master.

Filed May 8, 1922. G. H. Marsh, Clerk. [28]

AND AFTERWARDS, to wit, on the 8th day of May, 1922, there was duly filed in said court, the findings of fact and conclusions of law of Special Master, in words and figures as follows, to wit: [29]

In the District Court of the United States for the District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Copartners, as SPIROPLOS BROTHERS, Both Individually and as Copartners.

Findings of Fact and Conclusions of Law of Special Master Upon Application for Discharge.

This matter coming on this 6th day of May, 1922, for the making of the findings of fact and conclu-

sions of law herein; the testimony having been heretofore taken before Forrest L. Hubbard, Referee in Bankruptcy, as a Special Master; and having been transcribed and duly considered by said Special Master; and final argument thereon by counsel having been heretofore made and the same having been heretofore and on December 6th, 1921, submitted to said Special Master and said Special Master having duly considered all of said testimony and the argument of counsel, and now being fully advised in the premises, makes the following

FINDINGS OF FACT.

I.

That as to specifications I and II as set forth in the specifications of grounds of opposition to bankrupt's discharge now on file herein, which have to do with the appearance of the bankrupts in response to orders made by the above-entitled Court and the Referee in Bankruptcy to whom the above-entitled case was referred, while the bankrupts appear to have been somewhat negligent, they do not appear to have wilfully and wantonly disobeyed and disregarded said orders, but on the other hand there [30] appears to have been more or less misunderstanding on the part of the bankrupts, their attorney and the Referee in Bankruptcy.

II.

That as to the eight head of cattle mentioned in specification III of the specifications above referred to, the testimony of D. L. Forsea found on pages 46 to 49, inclusive, of the testimony taken on Au-

gust 30th, October 24th and 25th, 1921, and the Trustee's Exhibits 6 and 23, show that these cattle were sold by George Spiroplos, one of the bankrupts, subsequent to the adjudication of bankruptcy herein, and that the money was paid to and received by George Spiroplos personally, and not for the use and benefit of the Trustee herein or the creditors, and that said sale of these cattle was made in such a way as would indicate that George Spiroplos claimed them as his own property; and the testimony of George Spiroplos as found on pages 23 to 28, inclusive, of the testimony taken on May 26th, 1921, and as found on Page 142 of the testimony taken on August 30th, October 24th and 25th, 1921, is so contradictory that it is entitled to no credit whatever; and the testimony of John Demas, as found on pages 223 and 224 of the testimony taken on August 30th, October 24th and 25th, 1921, is so indefinite and uncertain as to be of no value whatever; and the Special Master therefore finds that the bankrupts herein have knowingly omitted these cattle from the list of their property and assets as set forth in their schedules and that said cattle were, at the time of the filing of said schedules, the property of either the bankrupts as copartners, or, of George Spiroplos, individually.

III.

That as to the McCormick Mower mentioned in specification III of the specifications above referred to, the testimony of George Spiroplos, as found on pages 24 to 26, inclusive, of the [31] testimony taken on May 26th, 1921, and as found on pages

22 to 32, inclusive, of the testimony taken on June 7th, 1921, and as found on pages 144 to 148, inclusive, 151, 169, 174 to 178, inclusive, and 219, of the testimony taken on August 30th October 24th and 25th, 1921, is so contradictory that it is impossible to reconcile the same so as to give it any credit or consideration whatever; and the testimony of John Demas, as found on pages 57 to 66, inclusive, of the testimony taken on June 7th, 1921, and on pages 214 to 218, inclusive, 220 and 237 to 240, inclusive, of the testimony taken on August 30th, October 24th and 25th, 1921, is so contradictory that it is impossible to reconcile the same so as to give it any credit or consideration whatever; while the testimony of Mr. Forsea, found on pages 49 to 53, inclusive, and that of Mr. Duggar, found on pages 23 to 41, inclusive, and that of Mr. Smith, found on pages 129 to 134, inclusive, all being a part of the testimony taken on August 30th, October 24th and 25th, 1921, clearly indicates that this mower was purchased by George Spiroplos on behalf of the partnership now in bankruptcy, and that the same was sold by George Spiroplos, one of the bankrupts herein, subsequent to the adjudication of the bankruptcy herein, and the money paid to and received by George Spiroplos personally, and not for the use and the benefit of the trustee herein or the creditors of any of the bankrupts; and the Special Master, therefore, finds that this McCormick Mower was owned by the partnership now in bankruptcy at the time of the making and filing

of the schedules herein and was knowingly omitted from said schedules by the bankrupts.

IV.

That as to the gasoline engine mentioned in specification III of the specifications above referred to, the testimony of George Spiroplos, as found on pages 21 to 23, inclusive, as taken on May 26th, 1921, and on page 34 of the testimony taken on [32] June 7th, 1921, and on page 148 to 154, inclusive, and 158 to 160, inclusive, of the testimony taken on August 30th, October 24th and 25th, 1921, cannot be reconciled sufficiently to deserve any credit or consideration, and that the same is true of the testimony of John Demas as found on pages 60, 65 and 66 of the testimony taken on June 7th, 1921, and on pages 220, 221, 222, 240, to 244, inclusive, of the testimony taken on August 30th, October 24th and 25th, 1921; while the testimony of Mrs. Mc-Birney found on pages 4 to 15, inclusive, and of Mr. Daniel, found on pages 16 to 19, inclusive, of the testimony taken on August 30th, October 24th and 25th, 1921, Trustee's Exhibits 2, 3, 4, and 5, show conclusively that this engine was purchased by George Spiroplos, for the partnership now in bankruptcy prior to the adjudication of bankruptcy; and the testimony of Miss Kivett, as found in her deposition and also of Mr. Spaulding, as found in his deposition, as well as the admission of George Spiroplos, show conclusively that this engine was sold after the adjudication of bankruptcy herein by George Spiroplos, and that the purchase price was paid to him personally and not

for the use and benefit of the trustee herein or the creditors of any of these bankrupts; and the Special Master therefore finds that this gasoline engine was the property of the partnership now in bankruptcy at the time the schedules herein were made and filed, and that the same was knowingly omitted from said schedules by these bankrupts.

V.

That as to the lands described in specification IV of the specifications above mentioned, the testimony of George Spiroplos, as found on pages 32 and 33 of the testimony taken on June 7th, 1921, and also on pages 143, 144, 151, 154 to 174, inclusive, 185 to 194, inclusive, 202 to 205, inclusive and 248 to 250, inclusive, of the testimony taken on August 30th, October 24th and [33] 25th, 1921; and also the testimony of Mr. Soule, as found on pages 55, 56 and 62 to 71, inclusive, of the testimony taken on August 30th, October 24th and 25th, 1921; and also the testimony of Mr. Smith, as found on pages 80 to 89, inclusive, of the testimony taken on August 30th, October 24th and 25th, 1921; and also the testimony of William Pollman, as found on pages 102 and 103 of the testimony taken on August 30th, October 24th and 25th, 1921; and also Trustee's Exhibits 8, 9, 11, 12, 13, 13a, 14, 15, 16, 17, 18, all indicate to the entire satisfaction of the Special Master that this land was purchased by George Spiroplos, one of the bankrupts herein, either for himself, or for the partnership in bankruptcy herein long prior to the adjudication of bankruptcy herein, and that the same

was paid for by the partnership in bankruptcy herein, but that the title to said lands was taken in the name of John Demas in order to secure additional rights upon the Government range, and that said lands are still owned by the partnership in bankruptcy herein, or by George Spiroplos, one of the bankrupts herein, but that the record of title thereto is in the said John Demas; and that in view of the other testimony given herein by the said John Demas, and its contradictory character, that the testimony of John Demas, relative to said lands, is not entitled to any credit whatever; and that the Special Master therefore finds that said lands were owned by the partnership in bankruptcy herein, or by George Spiroplos, one of the bankrupts herein, at the time of the making and filing of the schedules herein, but that the same was knowingly omitted by the bankrupts herein, in their said schedules.

VI.

That on the —— day of June, 1921, an order was duly made and entered by F. L. Hubbard, as Referee in Bankruptcy, to whom the above-entitled case was referred, directing and ordering [34] said bankrupts to deliver to the Trustee herein all of the books, records and documents, showing the transactions of the business of the partnership, bankrupts herein, and also of the bankrupts individually, and that said bankrupts have failed, neglected and refused to deliver to said Trustee a certain account-book wherein, as shown by the testimony of Mr. Soule on pages 56 to 61, inclusive,

of the testimony taken on August 30th, October 24th and 25th, 1921, the account between these bankrupts and John Demas was kept.

VII.

That as to specification VI of the specifications above referred to, the bankrupts attempted to give John Demas a preference by attempting to transfer an automobile belonging to Miltiades Spiroplos, one of the bankrupts herein, to the said John Demas in payment of a pre-existing debt, and that said attempt at the transfer of said automobile was made within 4 months prior to the adjudication herein and that said automobile was in truth and fact the property of said Miltiades Spiroplos at the time of the making and filing of the schedules herein and that said automobile was knowingly omitted from said schedules by Miltiades Spiroplos, one of the bankrupts herein.

VIII.

That said bankrupts herein were the owners of 1200 posts at the time of the filing of their schedules herein, and that said posts were knowingly omitted from said schedules by said bankrupts herein.

IX.

That the testimony offered relative to a claim against Mrs. Bastian in favor of the bankrupts is not clear enough to base a finding upon as to whether or not there existed, at the time of the filing of the schedules herein, a claim against Mrs. Bastian [35] and in favor of the bankrupts herein, or either, or any of them.

X.

That the bankrupts herein and the said John Demas, hereinbefore mentioned, have so conducted and arranged matters in their dealings and business connections with each other, as to make it impossible to ascertain many facts relative to the matters now under consideration and have undertaken to state the facts relative to several of their business transactions, but that in their statements from time to time, as shown by the record herein, all of which have been made under oath, they have contradicted themselves so frequently and in such a manner as to convince the Special Master that they have conspired and contrived together for the purpose of concealing properties belonging to the bankrupts and attempting to make it appear that said properties belonged to said John Demas.

XI.

That the testimony taken on May 27th, 1921, was taken primarily as a part of the examination of the bankrupts and was by stipulation (page 61, testimony of August 30th, October 24th and 25th, 1921) offered and received without objection as an exhibit in the hearing upon objections to the discharge.

From the foregoing findings of fact, the Special Master herein makes the following

CONCLUSIONS OF LAW.

I.

That the bankrupts herein have knowingly and wilfully concealed and withheld from their bankrupt estate and from the Trustee herein, and have knowingly and wilfully omitted from their schedules

herein, certain properties, both real and personal, owned by them at the time of the filing of their petitions and schedules [36] and that since the adjudication herein have disposed of a portion of said personal properties and have retained the proceeds from such sales for their own use and benefit; and have therefore failed to comply with the Acts of Congress relating to Bankruptcy.

II.

That the objections to the discharge of said bankrupts and the specifications of grounds for opposition to discharge now on file herein, have been established by the testimony offered herein and that by reason thereof, the said bankrupts herein as copartners and also as individuals are not entitled to a discharge from their obligations in this proceeding.

III.

That the above-named bankrupts as copartners and as individuals, should be by an order of the above-entitled Court denied a discharge from any of their obligations and debts set forth in their schedules herein.

FORREST L. HUBBARD,

Referee in Bankruptcy and Special Master.

Notice of the filing of within findings mailed May 8, 1922, to John L. Rand, attorney for the bankrupts, and to A. A. Smith, attorney for Trustee and objecting creditors.

G. H. MARSH,

Clerk.

By L. S. Rogers,

Deputy.

Filed May 8, 1922, 9:00 o'clock A. M. G. H. Marsh, Clerk. [37]

AND AFTERWARDS, to wit, on the 6th day of June, 1922, there was duly filed in said court objections and exceptions to findings of Special Master, in words and figures as follows, to wit: [38]

In the District Court of the United States for the District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Copartners, as SPIROPLOS BROTHERS, Both Individually and as Copartners.

Objections and Exceptions to Findings of Special Master.

Come now the bankrupts above named, by their attorneys, William H. Packwood and Fred W. Packwood, and object and except to the findings of fact and conclusions of law made and filed in the above-entitled cause on the 8th day of May, 1922, by Forrest L. Hubbard, Referee in Bankruptcy and Special Master, which said objections and exceptions are as follows, to wit:

I.

Object and except to the finding of fact No. II for the reason and on the grounds that said finding of

fact is contrary to the weight and preponderance of the testimony taken and submitted in said cause.

II.

Object and except to the finding of fact No. III for the reason and on the grounds that said finding of fact is contrary to the weight and preponderance of the testimony taken and submitted in said cause.

III.

Object and except to the finding of fact No. IV for the reason and on the grounds that said finding of fact is contrary to the weight and preponderance of the testimony taken and submitted in said cause. [39]

IV.

Object and except to the the finding of fact No. V for the reason and on the grounds that said finding of fact is contrary to the testimony taken and submitted in said cause; for the further reason and on the ground that the Referee and Special Master was without jurisdiction to hear and determine the matters set forth in said finding, or to make said finding of fact, it appearing conclusively by the record that the lands described in said finding were conveyed to one John Demas by one Miller and his wife in the year 1918, and that neither of the bankrupts have ever had any right, title or interest therein.

V.

Object and except to the finding of fact No. VI for the reason and on the grounds that said finding of fact is contrary to the testimony taken and submitted in said cause, and for the further reason

that there is no testimony in the record showing that the bankrupts had any account-book in which the account between them and John Demas was kept.

VI.

Object and except to the findings of fact No. VII for the reason and on the grounds that said finding of fact is contrary to the weight and preponderance of the testimony taken and submitted in said cause.

VII.

Object and except to finding of fact No. VIII for the reason and on the ground that said finding of fact is contrary to the weight and preponderance of the testimony taken and submitted in said cause, and that the Referee and Special Master had no jurisdiction to make said finding.

VIII.

Object and except to finding of fact No. X for the reason and on the grounds that said finding of fact is contrary to the weight and preponderance of the testimony taken and submitted in said cause.
[40]

IX.

Object and except to Conclusion of Law Nos. I, II and III made by the Referee in Bankruptcy and Special Master upon the findings of fact made and found by him, for the reason and on the ground that said conclusions and each and all thereof are not supported by the weight and preponderance of the testimony taken and submitted in said cause.

WILLIAM PACKWOOD, and
FRED W. PACKWOOD,

Attorneys for Bankrupts.

State of Oregon,
County of Baker,—ss.

Service of the foregoing objections and exceptions is hereby acknowledged at Baker, Oregon, this 3d day of June, 1922.

FORREST L. HUBBARD,

Referee in Bankruptcy and Special Master.

A. A. SMITH,

Attorneys for Creditors and for Trustee in Bankruptcy.

Filed June 6, 1922, 1:30 o'clock P. M. G. H. Marsh, Clerk. [41]

AND AFTERWARDS, to wit, on the 17th day of July, 1922, there was duly filed in said court an order of Court overruling objections to discharge, in words and figures as follows, to wit:
[42]

In the District Court of the United States for the District of Oregon.

No. B-5595.

July 17, 1922.

In the Matter of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Individually and as Copartners as GEORGE S. SPIROPLOS & BROS., Bankrupts.

Order Overruling Objections to Discharge.

This cause was heard by the Court upon objections of the Trustee herein and certain creditors to the discharge of the above-named bankrupts, and was argued by Mr. F. W. Packwood and Mr. Bert Henry, of counsel for the bankrupts, and by Mr. A. A. Smith, of counsel for the Trustee and said creditors; and the Court having considered the said objections and the testimony taken before Forrest L. Hubbard as Special Master.

It is ORDERED and ADJUDGED that said objections be and the same are hereby overruled and that said bankrupts be granted a discharge herein.

R. S. BEAN,
Judge.

Filed July 7, 1922. G. H. Marsh, Clerk. [43]

AND AFTERWARDS, to wit, on the 17th day of July, 1922, there was duly filed in said court, separate orders discharging bankrupts, in words and figures as follows, to wit: [44]

In the District Court of the United States for the District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS, and GUST SPIROPLOS, Individually and as Copartners as GEORGE S. SPIROPLOS & BROS., Bankrupts.

Order Discharging Gust Spiroplos.

WHEREAS, Gust Spiroplos, one of the partners above named, of Home, in the County of Baker, in said district, has been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf.

It is, therefore, ORDERED by the Court that said Gust Spiroplos, be discharged from all debts and claims which are made provable by said Acts against his estate, and against said partnership estate, and which existed on the 30th day of October, A. D. 1920, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

WITNESS the Honorable ROBERT S. BEAN, Judge of said District Court, and the seal thereof, this 17th day of July, A. D. 1922.

[Seal of the Court]

G. H. MARSH,
Clerk.

L. S. Rogers,
Deputy.

Filed July 17, 1922, at 2 o'clock P. M. G. H. Marsh, Clerk. By L. S. Rogers, Deputy Clerk.
[45]

In the District Court of the United States for the
District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE S. SPIROPLOS, MIL-
TIADES SPIROPLOS, and GUST SPIR-
OPLOS, Individually and as Copartners as
GEORGE S. SPIROPLOS & BROS., Bank-
rupts.

Order Discharging Miltiades Spiroplos.

WHEREAS, Miltiades Spiroplos, one of the
partners above named, of Home, in the County of
Baker in said District, has been duly adjudged a
bankrupt, under the Acts of Congress relating to
bankruptcy, and appears to have conformed to all
the requirements of law in that behalf.

It is, therefore, ordered by the Court that said
Miltiades Spiroplos be discharged from all debts and
claims which are made provable by said Acts against
his estate, and against said partnership estate,
and which existed on the 30th day of October, A. D.
1920, on which day the petition for adjudication was
filed by him; excepting such debts as are by law
excepted from the operation of a discharge in bank-
ruptcy.

WITNESS, the Honorable ROBERT S. BEAN,
Judge of said District Court, and the seal thereof,
this 17th day of July, A. D. 1922.

[Seal of the Court]

G. H. MARSH,
Clerk.

L. S. Rogers,
Deputy.

Filed July 17, 1922, at 2:00 o'clock P. M. G. H. Marsh, Clerk. By L. S. Rogers, Deputy Clerk.
[46]

In the District Court of the United States for the
District of Oregon.

No. B-5595—IN BANKRUPTCY.

In the Matter of GEORGE S. SPIROPLOS, MILTIADES SPIROPLOS, and GUST SPIROPLOS, Individually and as Copartners as GEORGE S. SPIROPLOS & BROS., Bankrupts.

Order Discharging George S. Spiroplos.

WHEREAS, George S. Spiroplos, one of the partners above named, of Home, in the County of Baker in said District, has been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf.

It is, therefore, ordered by the Court that said George S. Spiroplos be discharged from all debts and claims which are made provable by said Acts against his estate, and against said partnership estate and which existed on the 30th day of October, A. D. 1920, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

WITNESS the Honorable ROBERT S. BEAN,
Judge of said District Court, and the seal thereof,
this 17th day of July, A. D. 1922.

[Seal of the Court]

G. H. MARSH,

Clerk.

L. S. Rogers,

Deputy.

Filed July 17, 1922, at 2 o'clock P. M. G. H.
Marsh, Clerk. By L. S. Rogers, Deputy Clerk.
[47]

AND AFTERWARDS, to wit, on the 25th day of
September, 1922, there was duly filed in said
court an order denying petition for rehearing
on objections to discharge, in words and figures
as follows, to wit: [48]

In the District Court of the United States for the
District of Oregon.

No. B-5595.

September 25, 1922.

In the Matter of GEORGE SPIROPLOS, MIL-
TIADES SPIROPLOS, and GUST SPIR-
OPLOS, as SPIROPLOS BROTHERS, In-
dividually and as Copartners, Bankrupts,

**Order Denying Petition for Rehearing on Objec-
tions to Discharge.**

This cause was submitted to the Court upon the
petition of the Trustee of the above-named bank-

rupts, for a rehearing of the order of this Court overruling the objections to the discharge of the bankrupts and granting said bankrupts a discharge; and the Court having considered the said petition and being now fully advised in the premises, it is **ORDERED** and **ADJUDGED** that said petition for rehearing be and the same is hereby denied.

WITNESS the Honorable ROBERT S. BEAN, Judge of said court, and the seal thereof, at Portland, in said district, this 25th day of September, 1922.

[Seal]

G. H. MARSH,
Clerk.

By L. S. Rogers,
Deputy.

Filed Sept. 25, 1922. G. H. Marsh, Clerk. [49]

AND AFTERWARDS, to wit, on the 20th day of September, 1922, there was duly filed in said court a petition for appeal in words and figures as follows, to wit: [50]

In the District Court of the United States for the District of Oregon.

In the Matter of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Bankrupts.

Petition for Appeal.

Comes now Charles Bodeau, the duly qualified, elected and acting trustee of the estate of the

above-named bankrupts and being thereunto duly authorized, conceiving himself aggrieved by the judgment or decree made and entered in the above-entitled case on the 17th day of July, 1922, granting a discharge to the above-named George Spiroplos, Miltiades Spiroplos and Gust Spiroplos and the denial of his petition for rehearing upon said judgment or decree made and entered herein on the 25th day of September, 1922, does hereby appeal from said decree and from said order and the whole of each of said orders, judgment or decree to the United States Circuit Court of Appeals for the 9th Circuit for the reasons specified in the assignment of errors which is filed herewith.

And the said Charles Bodeau, Trustee, prays that he be allowed this appeal and that the transcript of record, papers and proceedings upon which said judgment or decree was made duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Circuit.

A. A. SMITH,

Solicitor for Appellant.

The above petition for appeal is hereby allowed.

R. S. BEAN,

Judge of the District Court of the United States
of America for the District of Oregon.

Filed Sept. 30, 1922. G. H. Marsh, Clerk.

State of Oregon,
County of Baker.

Due service of a duly certified copy of the within [51] petition for appeal is hereby admitted, this 30th day of September, 1922.

GRIFFITH, LEITER & ALLEN,
Of Attorneys for Bankrupts. [52]

AND AFTERWARDS, to wit, on the 30th day of September, 1922, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [53]

In the District Court of the United States for the District of Oregon.

In the Matter of GEORGE SPIROPLOS, MILTIADES SPIROPLOS, and GUST SPIROPLOS, Bankrupts.

Assignment of Errors.

Comes now Charles Bodeau, duly elected, qualified and acting Trustee of the estate of the above-named bankrupts, of Baker, in the District of Oregon, appellant, and makes and files the following assignment of errors upon which he will rely for the prosecution of his appeal from the order denying petition for rehearing, said order being made and entered on September 25, 1922, and from the orig-

inal order the same being entered on July 17, 1922, in the above-entitled cause.

I.

That the Court erred in overruling the findings of fact Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, made by the Special Master in Chancery for the reason that the said findings of fact and each thereof were supported by the testimony presented and heard by the said Referee and that the said findings were fully supported by the testimony.

II.

That the Court erred in overruling the conclusions of Law Nos. 1, 2, and 3 made by the said Referee in Bankruptcy and Special Master for the reason that the said conclusions of law were fully supported by the testimony which was produced upon the hearing and that the said conclusions of law were fully supported by the findings of fact made by the said Referee. [54]

III.

That the Court erred in granting to the said bankrupts their discharge for the reason that the testimony produced in the case showed that the said bankrupts had wilfully concealed property, particularly gas engine mowing machine, eight head of cattle, twelve hundred posts and their ownership of one hundred and sixty acres of land.

IV.

That the Court erred in granting the discharge to the said bankrupts for the reason that the testimony in the said case showed that the said bankrupts wilfully failed and neglected to include in the

schedules filed, the property mentioned in the preceding assignment.

V.

That the Court erred in granting a discharge to the said bankrupts for the reason that the said bankrupts wilfully and purposely committed perjury in swearing to the said schedules and in the testimony taken before the said Referee.

VI.

That the Court erred in granting the discharge to the said bankrupts for the reason that the said bankrupts wilfully failed to produce their books and papers showing their transaction and particularly the transactions with one John Demas.

VII.

That the Court erred in granting the discharge to the said bankrupts for the reason that at the time of the said filing of the said schedules the said bankrupt Miltiades Spiroplos was the owner of an automobile which said automobile had within four months prior to the adjudication been transferred by the said [55] Miltiades Spiroplos to one John Demas for the purpose of granting a preference in the payment of a debt owing to the said John Demas and the said automobile was knowingly and fraudulently omitted from said schedules by said bankrupts.

VIII.

That the Court erred in granting a discharge to the bankrupts for the reason that the said bankrupts and one John Demas conspired together for the purpose of concealing assets of the said bank-

rupts and preventing the said assets coming into the hands of the trustee and the appropriation of the proceeds thereof to the benefit of the said bankrupts and that the testimony produced at the hearing fully supported the said claim and fully supported the findings made by the Referee and Special Master in Chancery.

IX.

That the Court erred in denying the petition for rehearing upon the matters alleged and set forth in the foregoing assignment of error and that the said petition for rehearing should have been granted and the said matters reopened and that upon such rehearing the decree of the Court in granting the said discharge should have been reversed and the said bankrupts refused a discharge.

In order that the foregoing assignments of error may be and appear of record the Trustee, appellant herein, presents the same to the Court and prays that such disposition be made thereof as in accordance with the law and statute of the United States in such cases made and provided and appellant prays a reversal of the said order and decree appealed from and upon which a rehearing was asked, from each and every part thereof entered by the United States District Court for the District of Oregon.

A. A. SMITH,

Solicitor for Trustee and Appellant.

Office and Postoffice Address: Shoemaker Bldg.,
Baker, Oregon.

Filed Sept. 30, 1922. G. H. Marsh, Clerk. [56]
State of Oregon,
County of Baker.

Due service of a duly certified copy of the within assignment of errors is hereby admitted, this 30th day of September, 1922.

GRIFFITH, LEITER & ALLEN,
Of Attorneys for Appellees. [57]

AND AFTERWARDS, to wit, on the 29th day of March, 1923, there was duly filed in said court a praecipe for transcript of record on appeal, in words and figures as follows, to wit:
[58]

In the District Court of the United States for the District of Oregon.

In the Matter of the Bankruptcy of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Bankrupts.

Praecipe for Transcript of Record on Appeal.

To the Hon. Geo. H. Marsh, Clerk of the Above-entitled Court.

You will please be advised that Charles Bodeau, Trustee, appellant in the above-entitled proceedings desires and requests that the following portions of the record in the above-entitled cause be included in the transcript on appeal, to wit:

I.

Schedule B-1 of the bankrupts' petition to be adjudged bankrupts and the first item in Schedule B-4, and the oath to the same, to be included with the first item in Schedule B-4 the title or heading to the same, the portion to be copied being as follows:

Schedule B-1.
REAL ESTATE.

Flick Ranch at Home, Ore., described as follows: Lot 2, W $\frac{1}{2}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$ and SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 15, and Lots 1, 2 and 3, and E $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 22, all in Tp. 12, S. R. 45 E. W. M. in Baker County, Ore.

Incumbered by mortgage to First National Bank at Baker City, Oregon, for \$71000.00 Dec. 10, 1919.

This real estate mortgage was given to secure the payment of certain notes inadequately secured by chattel mortgages and covers other property hereinafter more particularly described.

20000.00

George S. Spiroplos Homestead, about six miles from Home, Ore. described as follows:

N $\frac{1}{2}$ of SW $\frac{1}{4}$, W $\frac{1}{2}$ and SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 22, E $\frac{1}{2}$ of NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 27, all in Tp. 11, S. R. 45 E. W. M., in Baker County, Ore.

Covered by mortgage above described.

Same as stated above

1000.00

Total

\$21000.00

(Signed) GEORGE SPIROPLOS.
MILTIADES SPIROPLOS.
GUST SPIROPLOS.

Schedule B-4.

Property in Reversion, Remainder, or Expectancy,
Including Property Held in Trust for the
Debtor or Subject to Any Power or Right to
Dispose of or to Charge.

Interest in land. NONE

(Signed) GEORGE SPIROPLOS.
MILTIADES SPIROPLOS.
GUST SPIROPLOS.

OATH TO SCHEDULE B.

United States of America,
District of Oregon,
County of Baker,—ss.

On this 20th day of October, A. D. 1920, before me personally came George Spiroplos, Miltiades Spiroplos and Gust Spiroplos, the persons mentioned in and who subscribed to the foregoing Schedule (marked B 1, 2, 3, 4, 5, 6,) and who, being by me first duly sworn, did declare the said schedule to be a statement of all their estate, both real and personal, in accordance with the Acts of Congress relating to bankruptcy.

(Signed) GEORGE SPIROPLOS.
MILTIADES SPIROPLOS.
GUST SPIROPLOS.

Subscribed and sworn to before me this 20th day
of October A. D. 1920.

J. L. SOULE,

Notary Public for Oregon.

My Commission expires April 29, 1921.

II.

All that portion of Trustees' Exhibit No. 14, as follows:

"To the First National Bank of Baker City, Oregon,

For the purpose of obtaining credit with you from time to time we herewith submit the following as being a fair and accurate statement of our financial condition on November 27, 1918,

DESCRIPTION OF REAL ESTATE.

J. W. Flick ranch near Home, Oregon, about 330 acres.

McWaters, 160, near Home, Oregon.

Miller Place near Home, Oregon, stands in name of John Demas, \$2,700.00.

(Signed) GEORGE SPIROPLOS.

III.

All that portion of Trustees' Exhibit No. 16, the [60] same being the Inventory and Appraisement in the matter of the estate of Nicholas Spiroplos, deceased, as follows:

Also an undivided one-fifth interest in what is known as the Miller Ranch now standing in the name of John Demas and described as follows:

E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Section 12, Tp. 12 S., R. 44 E.,
W. M. E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, NW. $\frac{1}{4}$
of SE. $\frac{1}{4}$, and Lots 1 and 2, all in Section 7,
Tp. 12, S. R. 45 E. W. M. \$200.00

State of Oregon,

County of Baker,—ss.

George Spiroplos, the administrator of the estate of Nicholas Spiroplos, deceased, being duly sworn

says: That the annexed Inventory contains a true statement of all the real and personal property of the said deceased which has come into my knowledge and possession and particularly of all money belonging to the said deceased and all just claims of said deceased against the said ——.

GEORGE SPIROPLOS.

Subscribed and sworn to before me this 11th day of January A. D. 1919.

JAMES H. NICHOLS,
Notary Public for Oregon.

My Commission expires Nov. 29, 1919.

IV.

All that portion of Trustees' Exhibit 13, the same being the first semi-annual report of administrator of estate of Nicholas Spiroplos, deceased, as follows:

That the following is a true and correct copy of the Inventory and Appraisment of said estate in so far as the list of property embraced is covered to wit:

Together with other property not involved herein.

Also an undivided one-fifth interest in what is known as the Miller Ranch now standing in the name of John Demas and described as follows:

E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Section 12, Tp. 12 S., R. 44 E., W. M., and Lots 1 and 2, and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, all in Section 7, Tp. 12 S., R. 45 E., W. M.

(Signed) GEORGE SPIROPLOS,
Administrator and Petitioner Making Report.

State of Oregon,
County of Baker,—ss.

I, George Spiroplos, being first duly sworn, say:
That I am the duly appointed, qualified and acting
administrator of the estate of Nicholas Spiroplos,
deceased, and the petitioner who [61] signed the
above and foregoing report. That I have read the
same, know the contents thereof and that the facts
therein set forth are true as I verily believe.

(Signed) GEORGE SPIROPLOS.

Subscribed and sworn to before me this 19th day
of July, 1919.

(Signed) EDWARD A. LANDIS,
Notary Public for Oregon.

My Commission expires June 5, 1921.

V.

All that portion of Trustees' Exhibit No. 18, as
follows:

"That the said property of said deceased also
consisted of an undivided one-fifth interest in and
to the real and personal property of Spiroplos
Brothers, a partnership consisting of your adminis-
trator owning an undivided one-fifth interest
therein, Milt Spiroplos owning an undivided one-
fifth interest therein, Gust Spiroplos owning an un-
divided one-fifth interest therein, James Spiroplos
owning an undivided one-fifth interest therein."

"That on or about the month of April, 1919,
Elene Spiroplos, widow of the said Nicholas Spiro-
plos, and his sole heir at law married one Nick
Palantas, and that the said Nick Palantas after his

marriage to the said Elene Spiroplos commenced to take an active interest in the affairs of the Spiroplos Brothers and for and in behalf of his said wife made frequent demands upon your administrator for a settlement of said estate and for a disposition of the share of his wife as the heir at law of the said Nicholas Spiroplos, deceased; that the said demands were unreasonable and unwarranted and impossible of performance on the part of your administrator and that he was unable to arrive at a settlement with the said Palantas of the interest of the said Elene Spiroplos in the estate of her husband and that on the 9th day of October, 1919, the said Elene Spiroplos Palantas acting under the direction of her said husband filed in this court and in the matter of said estate her duly verified petition complaining of the manner in which the estate of said deceased was being administered and alleging that large sums of money belonging to the same were not accounted for and that your administrator was attempting to defraud the said estate out of a large sum of money and in said petition so filed said petitioner prayed for a hearing on said petition and for an order requiring your administrator to file a detailed statement showing all receipts and disbursements since the death of Nicholas Spiroplos; that he be discharged as administrator and a suitable person appointed by the Court to complete the administration of said estate; that thereafter and on the 9th day of October, 1919, an order was duly given, made and entered in said matter requiring your administrator to appear before the above-entitled court on

the 27th day of October, at the hour of ten o'clock A. M. and at said time to show cause if any why he should not be discharged as administrator of said estate, and that at said time he should also show cause why he had not filed a complete statement and account of his transactions as he was requested to file in said petition; that thereafter negotiations for the settlement of all controversies between the said Elene Spiroplos Palantas and your administrator were entered into between the said Elene Spiroplos Palantas and her attorneys, Messrs. Robert F. McGuire of Portland, Oregon, and A. A. Smith of Baker, Oregon, and Messrs. John L. Rand and James H. Nichols, attorneys for your administrator, with the result that your administrator procured the services of one J. L. Soule and submitted to him all of the accounts, checks, notes, data and generally all records in his possession covering all the transactions of Spiroplos Brothers and particularly the transactions had by your administrator in connection with the administration of the individual and partnership estate of Nicholas Spiroplos, deceased, to the end and for the purpose that the said J. L. Soule might make an analysis thereof and determine the value of the interest of the said Elene Spiroplos Palantas as the heir [62] at law of the said Nicholas Spiroplos, deceased; that attached hereto and by reference thereto made a part hereof is a true and correct copy of the final analysis and synopsis made by the said J. L. Soule and showing the net value of the entire holdings of Spiroplos Brothers, of which the estate of the deceased, Nicho-

las Spiroplos, was the owner of an undivided one-fifth; that all of the data used in preparing said analysis and statement was submitted to the said Elene Spiroplos Palantas and to her attorneys with the result that on the 8th day of November, 1919, a settlement of all matters and things in controversy between said George Spiroplos and herself was had and George Spiroplos, your administrator, in his individual capacity, Milt Spiroplos and Gust Spiroplos purchased all of the right, title, interest and claim of the said Elene Spiroplos Palantas, as sole heir at law of Nicholas Spiroplos, deceased, in and to all of the personal property belonging to the copartnership of George Spiroplos, Milt Spiroplos, Gust Spiroplos, James Spiroplos and Nicholas Spiroplos, deceased, including all notes and bills and accounts receivable, demands, credits, choses in action and all personal property of the estate of Nicholas Spiroplos, deceased, and at said time the said Elene Spiroplos Palantas made, executed and delivered to the purchasers of said personal property above named her certain bill of sale conveying the property above mentioned to them; that at said time and as a part of said transaction and settlement the said Elene Spiroplos Palantas made, executed and delivered her certain deed of conveyance, her husband joining therein, conveying to George Spiroplos, Milt Spiroplos, and Gust Spiroplos all of their right, title and interest in and to all of the real property belonging to the firm of Spiroplos Brothers, consisting of what is known as the Flick Ranch, the Miller Ranch, and

the McWaters Ranch and any and all other real property which may thereafter be found to belong to said partnership.”

In statement attached to above account prepared by Soule included among assets is the following:

Miller Ranch	\$1,600.00
Mortgage	600.00

State of Oregon,
County of Baker,—ss.

I, George Spiroplos, being first duly sworn, depose and say: That I am the duly appointed, qualified and acting administrator of the individual and partnership estate of Nicholas Spiroplos; that I have read the foregoing final account and report and know the contents thereof and that the same is true as I verily believe.

(Signed) GEORGE SPIROPLOS.

Subscribed and sworn to before me this 22d day of January, 1920.

(Signed) JAMES H. NICHOLS.

My Commission expires 15/5/23.

VI.

All that portion of Trustees' Exhibit 12, as follows:

This contract made and entered into this 8th day of November, 1919, by and between Elene Palantas, the widow of Nicholas Spiroplos, who died November 8, 1918, in Baker County, Oregon, and was a full member of the firm of Spiroplos Brothers, and Nick Palantas, her husband, of Baker County,

Oregon, the party of the first part and George Spiroplos, Milt Spiroplos, Gust Spiroplos and James Spiroplos, who together with the said deceased conducted the firm of Spiroplos Brothers, doing business in Baker County, Oregon, the party of the second part and George Spiroplos, administrator of the estate of Nicholas Spiroplos, deceased, the party of the third part, WITNESSETH:

THAT WHEREAS, Nicholas Spiroplos, a member of said firm died on November 8, 1918, leaving as his sole heir at law the said [63] Elene Spiroplos, now Elene Palantas, and said firm of Spiroplos Brothers were the owners of a large amount of both real and personal property and were indebted in large sums of money at the time of the death of said deceased; and

WHEREAS, the said Elene Palantas at this time desires to sell her interest in said partnership assets and to be released from all obligations of said firm.

NOW THEREFORE in consideration of the sum of Seven Thousand (\$7,000.00) Dollars to her in hand paid the receipt of which is hereby acknowledged the said parties of the first part do hereby covenant and agree as follows:

The parties of the first part shall make, execute and deliver to George Spiroplos, Milt Spiroplos and Gust Spiroplos, parties of the second part, a good and sufficient deed conveying to said parties all the right, title and interest of the parties of the first part in and to all of the real property belonging to

said firm consisting of what is known as the Flick Ranch, the Miller Ranch and the McWaters Ranch.

(Signed) ELENÉ PALANTAS.

NICK PALANTAS.

MILT SPIROPLOS.

By GEORGE SPIROPLOS.

GUST SPIROPLOS.

By GEORGE SPIROPLOS.

JAMES SPIROPLOS.

By GEORGE SPIROPLOS.

GEORGE SPIROPLOS.

GEORGE SPIROPLOS,

Administrator.

VII.

All of that portion of Trustees' Exhibit 13-A, the same being a mortgage from George Spiroplos, Milt Spiroplos and Gust Spiroplos to the First National Bank of Baker, as follows:

Now, therefore, in consideration of said loan and for the purpose of securing the payment of the said several sums of money mentioned in said note and for the purpose of securing the payment of each and all of said notes above described and the faithful performance of all of the covenants herein contained the parties of the first part do hereby grant, bargain, sell and convey unto the said party of the second part its successors and assigns forever, all of that certain real estate situate in Baker County and State of Oregon described as follows, to wit:

* * * * *

East half (E.1/2) of the Northeast quarter

(NE.1/4) of Section 12, Tp. 12, S., R. 44 East of Willamette Meridian; East half (E.1/2) of the Northwest quarter (NW.1/4), Southwest quarter (SW.1/4) of the Northeast quarter (NE.1/4), Northeast quarter (NE.1/4) of the Southeast quarter (SE.1/4) and Lots 1 and 2 of Section 7, all in Tp. 12, S., R. 45 East of Willamette Meridian.

* * * * *

TO HAVE AND TO HOLD the said premises and appurtenances and waters and water right, water privileges and ditches to the said party of the second part its successors and assigns forever.

And the said parties of the first part covenant that the said George Spiroplos, Milton Spiroplos and Gust Spiroplos are the owners in fee simple of the above-described premises and that the said premises are free and clear of all liens and encumbrances save and except existing mortgages and that they will warrant and forever defend the same against the lawful claims of all persons whomsoever save and [64] except as to said existing mortgages.

* * * * *

PROVIDED, NEVERTHELESS, and this conveyance is intended to be a real and chattel mortgage upon the lands above described and personal property above described to secure the payment of each and all of said promissory notes above described.

(Signed) GEORGE SPIROPLOS.
MILTON SPIROPLOS.
GUST SPIROPLOS.

Duly and regularly acknowledged by George Spiroplos and Milton Spiroplos on December 1st, 1919, before Joseph J. Heilner, Notary Public for Oregon, and by Gust Spiroplos on the 19th day of December, 1919, before O. H. P. McCord, Notary Public.

VIII.

Trustees' Exhibit 9, as follows:

STATE TREASURER'S RECEIPT AND
STATEMENT IN DUPLICATE.

State of Oregon,
Treasury Department.

No. 14284.

Remitted by: Receipt mailed to same.

Geo. Spiroplos,

c/o First National Bank,

P. O. Address: P. O. Box 256. P. O. Address 356.

Date of Letter, Baker, Oregon.

Jan. 10, 1920.

Received from Chas. T. Miller, Baker
County, Jan. 10, 1920, the sum of Eighteen
and

\$18.00,

which has been applied as follows:

Common School, interest—Interest on note

No. 12789 to Dec. 12, 1919,

\$18.00.

Received payment,

O. P. HOFF,
State Treasurer.

Countersigned:

BEN W. OLCOTT,
Secretary of State.

STATE TREASURER'S RECEIPT AND
STATEMENT IN DUPLICATE.

State of Oregon,
Treasury Department.

No. 21061.

Remitted by:

Receipt mailed to same.

Geo. S. Spiroplos,
Home, Oregon.

June 23, 1920.

355.

Received from Chas. T. Miller, Baker
County, the sum of Eighteen and \$18.00,
which has been applied as follows:

Assumed \$600.00 mortgage.

Common School, interest—Interest on note

No. 12789 to June 12, 1920 \$18.00.

\$12.00 refund enclosed by check No. 4874.

Received payment,

O. P. HOFF,
State Treasurer. [65]

Countersigned:

SAM A. KOZER,
Secretary of State.

IX.

Trustees' Exhibit 8, as follows:

GEO. S. SPIROPLOS & BROS.

Home, Oregon.

No. 219.

June 18, 1920.

Pay to the order of O. P. Hoff, State Treasurer,
\$30.00, Thirty and No/100 Dollars.

GEO. S. SPIROPLOS.

To the First National Bank, 96-28 Baker, Oregon.

X.

TESTIMONY OF GEORGE SPIROPLOS.

GEORGE SPIROPLOS, being called as a witness for the purpose of disclosing assets belonging to Spiroplos Brothers, testified as follows, beginning on page 21: That in the operation of the shearing plant that was being operated by Spiroplos Brothers they used an old gasoline engine which was returned from John Demas, the old engine being sold to Mrs. Bastian. That John Demas got the engine from Kleinschmidt, he and Chris. Coleman buying it. That George Spiroplos, two years before bought the plant from John Flick and before he bought the place Chris Coleman had a bunch of sheep. That George Spiroplos furnished the plant and everything, and Coleman and Demas furnished the engine and they all sheared together. That he did not know when the engine was purchased from Kleinschmidt, something like two or three years. That the engine was take down to the Flick place when it was first purchased and that was the first that he knew anything about it. That he did not remember the year. That the engine had since been sold to Stanfield by John Demas not very long before the testimony was taken, perhaps a month. That he did not know how much Demas got for it but he thought a couple of hundred dollars. That the engine had not been concealed down on the river bank since they had gone into bankruptcy but was right in front of the house all the time. That he had recently sold some cattle to Dan Forsea for \$260.00 and that he had deposited the money for

the [66] girls and that the cattle belonged to his little girls who inherited them from their mother.

That the mowing-machine which he sold to Forsea belonged to John Demas from the Miller Place. That when Charles Bodeau, the trustee, was on the place for the purpose of making an inventory of the property that he did not show the mowing-machine to Bodeau for the reason that it was on the Miller Place. That Demas got the mower with the place when he bought the place from Miller. That the cows and the mowing-machine were not placed in the inventory. That he did not offer to sell the mowing-machine to a man by the name of Dugger. That it was not hid in the brush at that time and that he did not make a price of \$55.00, and that he did not tell Dugger that if he wanted to buy the machine he would give him a bill of sale and date it back a year in order to avoid the bankruptcy and that he did not offer to sell it to Dugger at all, and that he talked to no one else about selling it. That he didn't know what kind of a mower it was that he sold to Forsea, didn't know what make it was, didn't know whether it was a McCormick or a different kind. That he turned the money which he received from the mower over to John Demas a short time before at his camp at Morgan Creek. He testified that the money received from the cattle was in the bank and when asked what bank replied that that was a question counsel did not need to know about because the money was spent and had been spent to buy clothes for the children. That he got the money and spent it for taking care of the

children, that he just carried it around, never used a check-book, just carried the \$260.00 around and spent it. That he didn't put it in the bank at all but that he cashed the check at the bank and got the money.

Mr. Spiroplos was later called as a witness for the purpose of discovering assets and testified as follows:

That the mower which was sold to Dan Forsea was in the field and that John Demas placed it there the previous fall. [67] That the mower was at the Miller Place about three years previously when he bought the Miller Place but that it had been brought down to the Flick ranch the year before by Demas. That he brought it down from the place some time in 1920. He didn't know just when as he wasn't there. That he saw it on the place for the first time in the spring of 1921. That John Demas told him it was on the place. That he didn't tell Dan Forsea who the mower belonged to when he sold it. Dan Forsea asked no questions. That he told Forsea he had a mower and a team and harness to sell. That he told Forsea where the mower was and that they went down and looked at it and Forsea paid \$50.00 for the mower. That he did not offer to sell this particular mower to Mr. Dugger but that he offered to sell him a different mower. That he had two mowers to sell and offered to sell Dugger another one. He denied that he told Dugger that the mower was hid away in the brush and that it was a new mower that had just been purchased and

denies that he offered to date the bill of sale back a year in order to avoid the date of bankruptcy.

He testifies that Demas owned the Miller Place, that he didn't have anything to do with it, that it belonged to Demas, and admits that Spiroplos paid for the place and that he gave the mortgage to the First National Bank on it and that he included the place in the inventory of the Nicholas Spiroplos estate as belonging to Spiroplos Brothers.

That the gasoline engine was bought after Spiroplos Brothers had bought the place from John Flick. That they had an old engine from the Flick Place but that it was too big for the shearing plant and that Spiroplos Brothers furnished the shearing plant, Chris Coleman and John Demas bought the gasoline engine and they didn't charge each other anything for the use of the plant. Spiroplos Brothers furnished the shearing plant and the other two men the gasoline engine. That he sold the engine to Gerald Stanfield for \$200.00. That he paid the \$200.00 to John Demas. [68]

Upon the hearing on the objections to the discharge, George Spiroplos again was called as a witness and beginning on page 137 of the transcript of testimony, testifies as follows: that the money which he had received from the sale of the cows which he claimed belonged to his children he had deposited in the bank to the credit of the children, but that he had it in his name at this time, the amount being something like \$400.00 and that the money was still in the bank.

That John Demas had a bunch of sheep and had

to have a home so he bought the Miller ranch, furnished the money and bought the ranch for him. This was in 1918. That Spiroplos Brothers were well fixed at that time, being worth over \$150,000.00. That just prior to that time he had bought a bunch of sheep for John Demas, coming to something like \$16,000.00. The Miller ranch had about fifteen acres of cultivated land and raised about thirty or thirty-five tons of hay. That John Demas purchased a mowing-machine to use on the Miller ranch in 1918, just after he bought the place. That in the season of 1919 he left it on the Miller Place, where it remained until the fall of the year 1920, when it was brought down to the Spiroplos ranch at Home, Oregon. That he sold the mowing-machine to Dan Forsea for John Demas for the sum of \$50.00, which he deposited in the Weiser National Bank, the deposit slip introduced in evidence of April 11, 1921, containing an item of \$150.00 is the slip representing that deposit. That some time later he gave Demas \$50.00 in cash. That he never tried to hide the mowing-machine and never moved it. That they had an old gas engine attached to the shearing plant which was sold to Mrs. Bastian. That they then made an agreement with John Demas that they would furnish the shearing plant and he would furnish the gasoline engine and they would shear the sheep together. That Demas furnished an engine. That he thought Mr. Demas ordered the engine in Baker, but that he thought it was shipped from the outside. He didn't know where from but that it was ordered through Baker.

That the engine was entered to Spiroplos and [69] charged to Spiroplos Brothers. That Demas ordered the engine himself and that he, George Spiroplos, did not order it. That George Spiroplos paid for it. That Spiroplos Brothers bought the smaller engine but that the larger engine was bought by John Demas, the smaller engine being returned by Spiroplos Brothers back to Nampa but that the last engine was ordered by John Demas through Baker but he didn't know where shipped from. That they paid \$2,800.00 for the Miller land, that is, \$2,200.00, and assumed the mortgage to the State Land Board for \$600.00. On page 151 he testifies that John Demas paid Spiroplos Brothers in full in 1919, 1918, the fall of the year some time, didn't remember what month. Later he stated the date to be in 1919 and that after the settlement made in 1919 John Demas did not owe Spiroplos Brothers anything except for some small store bills. That the engine was sold to Gerald Stanfield for \$200.00 and that George Spiroplos got the money for the sale. He deposited the money in the bank to his own credit but claims that he turned over in cash this amount to John Demas some time later. The money being deposited in the Weiser National Bank. The engine being sold in March or April, 1921. Trustees' Exhibit 4, a deposit slip representing a deposit of \$225.00 includes one of the payments made upon the gas engine. That he paid John Demas \$200.00 some time in June.

On cross-examination he testifies that he thinks the settlement with John Demas was made after

the death of Nick Spiroplos, which occurred on November 9th, 1918, but that he wasn't sure, he thought it was six or seven months afterwards. That the thing that brought about a settlement was the fact that the First National Bank had credited to Spiroplos Brothers a deposit of \$5,300.00 which should have been credited to John Demas. That the \$5,300.00 represented the sale of the 1919 lamb crop some time in June, May, June or July. His best recollection that it was in June. That at the time the settlement was made with the widow of his brother in closing up his brother's estate the item wrongfully credited by the bank was charged up as a [70] liability against the estate. That the settlement with Demas was some time in the spring of 1919. That he was positive it was in 1919 in the spring after the wool was sold in May or June. That he was certain it came in those two months. That he thought the settlement took place at Home, Oregon. That when the settlement was concluded it was found that the books balanced. He didn't owe Demas and Demas didn't owe him. It just evened up in May, 1919. Demas didn't pay him anything and he didn't pay Demas anything. That later the lambs were sold and the bank made the deposit above referred to and that accounted for the fact that this item was charged up against the estate. It should be recalled that he testified previously that the credit made by the bank was the thing that brought about the settlement. He denied that he bought the gas engine himself and that Virgil Daniels the salesman for the Klein-

schmidt Hardware Company sold the engine to him. He admitted that Daniels had been down to his place and interviewed him trying to sell him the engine. That he came to Baker himself and closed the transaction some time in April, 1919, and the engine when shipped was charged to the account of Spiroplos Brothers. That he did not tell the Kleinschmidt Hardware Company to charge the engine to his account because he wasn't there and that he didn't buy it. That he paid for it but he didn't buy it. That Virgil Daniels lied when he said that the witness came in and bought the engine and that the witness was the only man that was ever talked to about the sale. Witness then testified that Spiroplos Brothers ordered the first engine and they did buy the engine in the first place, which was the engine turned back to the Kleinschmidt Hardware Company and that John Demas ordered the second engine which was shipped to Spiroplos Brothers and charged to Spiroplos Brothers and paid for by Spiroplos Brothers. That he was unable to produce anything to show that John Demas has ever made a settlement [71] with Spiroplos Brothers in which this engine was paid for by him and that he had known about the hearing for a month. That he doesn't remember any of the items in the settlement that was made at any time or any amounts that were paid. He testifies the checks which had previously been introduced in evidence as the checks paid him for the engine. They were offered in evidence at this time

and were marked Trustee's Exhibit 19, and Trustee's Exhibit 20 and are as follows:

TRUSTEE'S EXHIBIT 19.

R. N. Stanfield. Stanfield, Ore.

Ontario, Oreg., Apr. 23, 1921.

Pay to the order of George Spiroplos, \$75.00
Seventy-five and no/100 dollars.

United States Nat'l, Vale, Oregon.

G. E. STANFIELD,

By IVY M. LANDIS.

TRUSTEE'S EXHIBIT 20.

Bal. in Full on Shearing Plant,
Chge. Equipment.

No. 30892.

R. N. STANFIELD,

Dealer in Livestock.

Sheep a Specialty.

Weiser, Ida., 5/4, 1921. \$225.00.

Pay to the order of Geo. Spiroplos, Two Hundred
twenty-five and no/100 Dollars.

Value received and charge to account of

K. W. KIVETT.

To R. N. STANFIELD,

Weiser, Ida.

He claims to have paid Demas the \$200.00. Some time in June, he didn't know at what place, at some sheep camp right after shearing and paid him in cash. That he took no receipt even tho he knew that the gas engine transaction was being investigated at the time. That he had testified before the referee on the 26th of May at which time the

gas engine was a matter of inquiry but that he took no receipt from Demas for the payment of the \$200.00. On page 167 witness testifies that Spiroplos Brothers owned the Miller Ranch until some time in May 1919, holding it on account of money which John Demas owned but [72] that they didn't own it after May. That he didn't read the report which was filed by him as administrator on July 21st, 1919, in which statement was made that the Miller Ranch was an asset of Spiroplos Brothers. That he paid the interest on the mortgage on the Miller Ranch for 1919 and 1920. That he didn't remember seeing Trustee Exhibit No. 14, the statement made to the bank which included the Miller Ranch as an asset but that it was his signature appearing on the statement. He denies that he ever made any statement to Mr. Pollman about the Miller Ranch or the reason that it was taken in the name of John Demas. He later admits on page 171 that he told Pollman he wanted to buy the land so that Demas could have a home and be able to put his sheep on reserve and that was why he was buying the land in Demas' name. That Demas paid the \$2,200.00 which had been advanced by Spiroplos Brothers in 1919 some time in May. This was 1919. He admits that they gave a mortgage to the First National Bank in which the Miller land was included. That the signature on the mortgage was genuine.

That the mowing-machine was purchased by John Demas in 1918 some time in the spring but that he did not know what month. That when

he testified previously that the reason he didn't point out this mowing machine to Charles Bodeau was because it was then on the Miller place and not on the Flick place where Charles Bodeau was and that John Demas got the machine with the Miller place when he bought that place. That there was some mistake. That Demas did not buy it with the Miller place and that when he so testified previously he was mistaken. That there was no mower with the Miller place when he (George Spiroplos) bought it. That there was no old mower with the Miller place when Spiroplos bought it and that he made a mistake when he so testified. That he got mixed up between the McWaters place and the Miller place. That when they bought the McWaters place they got an old mower. That Demas had no interest in the McWaters place whatever. That there never was an old mower on the Miller place. [73]

On redirect examination this witness testified that the reason the Miller land was included in the inventory was because it had not yet been paid for by Demas. That the inventory was prepared in the handwriting of Mr. James H. Nichols, one of the attorneys for administrator of the estate. That he explained to Mr. Nichols about the money that Demas owed on the place. That he didn't remember just how it was explained but that it was explained fully to Mr. Nichols and as a result the land was placed in the inventory. That he told the bank when he signed the mortgage that the Miller land did not belong to him and that John Demas owned

it but in spite of that the bank put it in the mortgage and he signed it. That his attorneys Mr. Rand and Mr. Nichols prepared the contract of settlement between him and Elene Palantas in both of which statements were made that Spiroplos owned the Miller Ranch. That in all of the transactions Mr. Rand and Mr. Nichols were acting as attorneys for the witness. On examination by the Special Master witness testified that at the time the mortgage was given to the First National Bank the bank knew that Demas did not owe anything to Spiroplos Brothers and that Spiroplos Brothers got all of the money that was borrowed at the time the mortgage was given and that all of the money went to Spiroplos Brothers.

At this time a recess was taken. After the recess was taken witness was placed on the stand and testified that the settlement which Spiroplos Brothers had with John Demas was in 1918, a short time after they had bought the Miller place and at that time the land was settled for and Demas paid Spiroplos Brothers for it and that he was mistaken when he previously testified that the settlement was in 1919. On cross-examination he testified that all matters between him and John Demas were settled up at that time and from that time on John Demas financed himself except some supplies that he purchased and which he occasionally charged up to Spiroplos Brothers and that some time [74] in 1918 he practically financed himself. That the settlement was made by the witness' brother Nick who was living at the time and Nick made the set-

tlement in the bank. That there was a check passed from Spiroplos to Demas or from Demas to Spiroplos but witness did not remember which. That after the settlement made in 1918 Spiroplos Brothers had no interest in the land but that he put the land in the inventory of the Nick Spiroplos estate and gave a mortgage to the First National Bank.

Mr. John Demas was called as a witness on behalf of the bankrupts in connection with an examination to disclose assets of bankrupts on June 7, 1921. This testimony by stipulation being incorporated into and made a part of the record at the hearing of objections to discharge of bankrupts. On page 57 Demas testifies as follows:

That he had been connected with Spiroplos Brothers for the years 1916 to 1918, at which time he paid all of his debts and after that time he took care of himself and that after 1918 he financed his own operations. That he and Chris Coleman bought the gasoline engine, George Spiroplos owning the shearing plant. That George promised to furnish the shearing plant and he and Chris Coleman furnish the gasoline engine and that he bought the gasoline engine in 1919 from Kleinschmidt Hardware Company paying \$300.00, using his own money to pay for it. That he told George Spiroplos to sell the gasoline engine for him about the 1st of May, 1921. That he talked to D. W. Dugger about a mower that George Spiroplos was trying to sell to Dugger and that when he talked to Dugger he thought that George was trying to sell Dugger an old mower that was on the Miller place

but that he knew that the mower that Dugger was trying to buy and the mower that he was talking to Dugger about was the mower that he, Demas, owned, and that he found out afterwards that the mower George was trying to sell to Dugger was the mower that he claimed [75] to have written to George to sell. That he bought the gas engine in 1919 some time in the early part of April. That he paid cash for his share and Chris Coleman paid for his share by check. *That he and Chris Coleman bought it together and he paid cash and Chris Coleman paid check and that afterwards Chris Coleman turned his interest over to him, Demas and had no more interest in it.*

At the close of this testimony counsel for bankrupts asked whether or not there would be any claim that the money which had been furnished by Spiroplos to purchase the Miller place had not been repaid because if there was such claim bankrupts desired to call the officers of the First National Bank of Baker to show that the land was purchased for Demas and that Demas owned it.

Counsel for Trustee notified counsel for bankrupts that the claim would be made that the Miller place was the property of the bankrupts and should have been included in the schedule of assets.

Mrs. McBIRNEY having been called as a witness to testify on behalf of the Trustee on the hearing on objections to discharge, testified as follows:

That she resided at Nampa, Idaho, and during the year 1919 was bookkeeper for the Eastern Oregon Hardware Company which had previously

been doing business as the Kleinschmidt Hardware Company. That the original notation of charges was made by salesmen and that she transferred from the sales slips to the books of the Company on the day that the sale was made. The transfer to the customer's ledger being made on the first of each month. Witness identified slips exhibited to her as entries made by her on the books of the company charging the account of Spiroplos Brothers. These slips were offered in evidence and marked as Trustee's Exhibit 2 and are in words and figures as follows: [76]

TRUSTEE'S EXHIBIT 2.

April

SPIROPLOS BROTHERS.

Home, Oregon.

40	2 Express .....	.85
41	2-32x4 Federal Tires)	
	1-28252) 57.45	114.90
	1-20379)	
	2-Buckets	1.10
	2-Buckets	1.30
	12- 3/8 x 2 1/2 Bolt .....	.39
	12- 3/8 x 3 " .....	.42
	12- 7/16 x 3 1/2 " .....	.54
	12- 5/16 x 4 1/2 .....	.42
	12 Plow Bolts .....	.60
	1 bucket .....	.60
	1 wrench .....	.50
62	3 647 Alfalfa Seed \$25.00 per 100.....	161.75

130	7	6-	410	Raw Hide pinions	16.50
		12-	406	strings .....	.72
		1-	403	Clutch Lever	1.10
		1-	412	Clutch Spindle	1.65
		3-	429-C	Yoke $\frac{1}{2}$ S	6.60
		1-	411	Long Spindle	1.10
		2-	416	Short Spindle	2.20
		24-	432	Joint Cogs	15.84
		12	D	Joint Guards	2.04
				Parcel Post .....	.35
151	7	1-6		H. P. Alamo Engine	270.20
				Frts. Baker to Home	8.25
		1-2		Glass oil cup	3.25
		1-3		" " " "	3.75
		1-14		Pipe wrench 2.50 postage .10....	2.60

Forward 619.52

April 9.

SPIROPLOS BROS.

Home, Oreg.

				Forward	619.52
274	17	2 doz.	50	Tea spoons	4.00
		$\frac{1}{2}$ doz.		table spoons	1.75
		2 set		knives and forks	7.00
		1		knife	7.00
		1 doz.		2 oiler	3.00
		15		Gal. P. M. Oil	14.70
		1-15		Gal drum	3.00
		5		cup grease .....	.65
		1		kettle 2.00; 1 kettle 2.75	4.75
		2		bx. 22 shorts .....	.60
		12		Tea cups and saucers	4.50

	12 Coffee cups and saucers	5.50
	1 28 Wash Basin .....	.40
	3 30 Wash Basin	1.50
	4 vegetable dishes	2.80
	1 bucket	1.25
	1 bucket .....	.60
	1 pitcher	3.50
	6 plates	1.25
275 17	6 pkg. garden seed .....	.90
	14 pkg. garden seed	1.05
	3 pkg. flower seed .....	.30
[77]		
322 19	prepaid freight	2.47
356 21	1-9 H. P. Alamo Engine	453.00
	Freight	27.50

 1166.39

Witness was then handed the ledger of the Kleinschmidt Hardware Company to which the items found on Trustee's Exhibit 2 were posted. On page 31 of this ledger under the letters "SI" was found the account of Spiroplos of Home, Oregon, and that this contained the items found on Exhibit 2 transferred on the 30th of April 1919. Page 33 of the ledger is a continuation of the Spiroplos account found on page 31. These two ledger sheets were offered in evidence, admitted and marked as Trustee's Exhibit 3. The portion of those sheets showing the charge for the items in Trustee's Exhibit 2 is as follows:

Date	Description	Folio	Debits	Date	Description	Folio	Credits
8/31	Mdse.	B. B.	5.32	12/19	C. B.	35	491.60
0/31	"	" "	47.35	12/20		J145	25.07
1/30	"	" "	387.70				
1/30	" to John S.	2 B	5.60				
9/30	" " Geo. S.	10 B	13.25				
0/31	" " Milt S.	27 B	57.45				
			516.67				516.67
2/30		B. B.	19.70	2/6	C. B.	43	184.60
1/31		" "	174.94	"/10	J 1	149	10.04
2/28		" "	35.89	3/10		J154	41.25
3/31		" "	70.32	4/21		J159	278.45
4/30		" "	1166.39	7/8		J169	13.18
5/31		" "	98.39	"/"		70	1058.23
7/31		" "	147.05				
8/30		" "	44.10				

That item 151 shown on Exhibit 2 is a six horsepower Alamo Gas Engine sold to Spiroplos Brothers for \$270.20 shipped to Spiroplos Brothers through the P. & O. Plow Company from Nampa, Idaho. That the item of \$278.45 shown on the credit side of the account under date of April 21st, represents the return [78] of the six-horsepower engine and upon its return credit for that amount was given which included the purchase price and freight charges. That the item in Exhibit No. 2 charged under date of April 29, was a nine-horsepower Alamo engine which was shipped by the company to Spiroplos Brothers. Witness is handed a check in the sum of \$1,058.23 which she testifies as having been paid to the Eastern Oregon Hardware Company by George Spiroplos which was paid to that Company in settlement of the account of Spiroplos Brothers and that this is the same item that appears in the ledger of that company as a credit in that sum of money and that the payment of that

sum of money paid up Spiroplos Brothers account in full. This check was offered in evidence and marked as Trustee's Exhibit 4, and is as follows:

GEORGE SPIROPLOS. 3029

Dealer in Sheep.

Home, Oregon, July 8, 1919. No. 223.

Pay to the order of the Eastern Oregon Hardware Co. \$1,058 23/100, Ten Hundred Fifty Eight 23/100 Dollars.

GEO. S. SPIROPLOS.

To the First National Bank,

96-28

Baker, Oregon.

Hardware Supplies.

Witness identifies an account carried by John Demas with the Eastern Oregon Hardware Company. This account was introduced in evidence and received as Trustee's Exhibit 5, and extends from the 15th of March 1918, to the 30th of August 1919. There is no gas engine charged on the account. The aggregate of all debit items is \$83.20 covering the entire period of time.

V. E. DANIELS, called as a witness in behalf of the Trustee testified as follows:

That in the month of April, 1919, he was salesman for the Eastern Oregon Hardware Company, formerly the Kleinschmidt Hardware Company and that as salesman he talked to George Spiroplos in connection with the sale of a gas engine. That [79] this was in the spring of 1919 prior to the 7th day of April. That he discussed the sale of the gas engine with George Spiroplos and with no one else. That he went down to the ranch of Spiroplos Broth-

ers on Snake River for the purpose of selling a gas engine. That a sale was later made to George Spiroplos of a six-horsepower Alamo gas engine which was shipped from Idaho through the P. & O. Plow Company, the sale being made by him on behalf of the Eastern Oregon Hardware Company, which Company subsequently sold out and was dissolved the books having been placed in the possession of Nichols & Hallock a firm of attorneys at Baker. That he had made a search of the records to find the original sales slip but that it had been lost in closing up the affairs of the company. On cross-examination he testified that the first engine sold was a 6-horsepower engine which was sent down to Spiroplos Brothers and returned. That later a 9-horsepower engine was sent.

Mr. D. W. DUGGER was called as a witness on behalf of the Trustee and testified as follows:

That he lived on Hibbard Creek about four miles from Snake River and about six miles from Home, Oregon. That he was acquainted with George Spiroplos and with John Demas. That he lived on what is known as the McWaters place on Hibbard Creek, which at one time was owned by Spiroplos Brothers. That about the 31st of March, 1921, he had a conversation with George Spiroplos relative to the purchase of the mowing-machine, this conversation taking place on the Flick place or the Spiroplos place. That at that time Spiroplos asked him if he wanted to buy a mower or sulky plow and he replied that he didn't need a plow but he needed a mowing-machine and

asked Spiroplos what kind of a mowing-machine he had for sale. Spiroplos answered that it was a McCormick and had been run one season and that he asked Spiroplos if it was on the schedules of property turned in by Spiroplos in his bankruptcy proceedings and Spiroplos [80] replied no. That Spiroplos told Dugger that he would sell Dugger the mowing-machine and give him a bill of sale and date it back a year so that there would be no conflict with the bankruptcy proceedings That he asked Spiroplos if he might look at the mowing-machine and Spiroplos replied that he had it put away in the brush. That this conversation took place on the road just in front of the house on the Flick place. That at that time there were two old mowers standing near the barn and that the mower which Spiroplos proposed to sell to him was neither of the two standing by the barn. That Spiroplos did not tell him the exact place where the mower was but told him that Spiroplos had it hid in the brush. That he was afraid to buy the mower just that way and he came to Baker and went to see the banker and was directed to see the Trustee in bankruptcy. That he went to see the Trustee in Bankruptcy relative to the matter. That he did not buy the mower. That the reason he asked Spiroplos as to whether or not this was in the list of property that had been turned in by Spiroplos at the time of his bankruptcy was because at another time he was considering purchasing a horse from Spiroplos and asked Mr. Baker a neighbor of his if it was safe to buy the horse from Spiroplos

and Mr. Baker told him that it depended on whether or not the horse was named in the list and asking Mr. Baker what list he meant was told that at the time of the bankruptcy the bankrupt had to make out a correct list of all his property and turn it into the court. That he presumed the reason that Spiroplos tried to sell him the mower and offered to date back the bill of sale was because he, Spiroplos, knew that Dugger needed a mower on his place and that it was a chance to sell it.

That John Demas stopped at his place shortly subsequent to the time of the conversation between witness and Sporoplos and told witness that he was talking about things that didn't concern his business and didn't hurt him any which witness thought was in reference to the fact that the witness had come [81] to Baker to find out about the right of Spiroplos to sell the mower and Demas told witness that the mowing-machine which Spiroplos was trying to sell to witness belonged to Demas. That when he, Demas, bought the Miller place two years before, the mowing-machine went with the place and that he loaned the mowing-machine to George Spiroplos and that he took it down on his place and never returned it.

Mr. H. P. SWISHER, called as a witness on behalf of the Trustee, testified as follows:

That he lived on Hibbard Creek and was in the cattle business and had a small ranch on that creek. That he was acquainted with George Spiroplos for about three or four years. That he knew where the Miller place was. That in May, 1921, he bought

some posts from Spiroplos which were on the Miller place for which he agreed to pay twelve cents apiece or to replace them and that he got 216 posts. That the posts were near the Miller place and had been cut for three or four years, juniper posts. On cross-examination he testified that he didn't know who had occupied the Miller place the year previous. That there was no one living there but that there had been sheep on the place in the spring, the sheep belonging, he supposed, to George Spiroplos. That he didn't replace the posts that he would have to pay for them and that he expected to pay George Spiroplos. That the posts were on the Miller place prior to the time that it was purchased and that they were cut on the Miller place.

Mr. D. L. FORSEA was called as a witness on behalf of the Trustee and testified as follows:

That he lives on Mr. Baker's ranch on the Flick place. That in March, 1921, he bought some cattle from George Spiroplos paying him \$260.00. That he bought three cows, a steer, two yearlings and two calves. George Spiroplos sold the cattle to him and that he paid George Spiroplos with a check. The check was [82] identified by the witness, offered in evidence as Trustee's Exhibit 6, and is as follows:

Baker, Oregon, 3-18, 1921. No. —.
BAKER LOAN AND TRUST COMPANY—96-30
Baker, Oregon.

Pay to the order of Geo. S. Spiroplos \$260.00,
Two Hundred Sixty and no/100 Dollars.

D. L. FORSEA.

That later he bought a team, harness and a mowing-machine for which he paid \$150.00. That he bought this property from George Spiroplos and paid George Spiroplos with a check. The check was identified, offered in evidence and marked as Trustee's Exhibit 7, and is as follows:

Baker, Oregon, April 11, 1921. No. —.
BAKER LOAN & TRUST COMPANY—96-30,
Baker, Oregon.

Pay to the order of Geo. Spiroplos \$150.00, One
Hundred Fifty and no/100 Dollars.

D. L. FORSEA.

That the mower was a five and a half foot cut McCormick mower. That at the time he bought it it was at the lower end of the field on the river bank below the bank in a clump of trees. That where the mower was is a big bank which you went around to get to the mower. There was a big bunch of brush on the side of the mower and that in getting to the mower you went in a northeasterly direction from the buildings and had to go north of the big bank to get to the mower. That he saw the mower there the day he bought it. That there is no farming land where the mower was but there is farming land above the mower. That there is no farming land between where the mower was and the

river and none below the bank behind which the mower was found. [83]

Mr. J. L. SOULE, called as a witness on behalf of the Trustee, testified as follows:

That he had been employed by Spiroplos Brothers for some time previous to their bankruptcy and had supervision over their books. That he turned over to the Trustee in Bankruptcy all of the books and records of Spiroplos Brothers that he had in his possession. That there was one book which was kept by George Spiroplos and which contained certain information about the business of Spiroplos Brothers which was not with the books turned over by him to the Trustee. That the last he saw this book it was in possession of George Spiroplos.

The witness identified a check given June 18, 1920, by George Spiroplos to O. P. Hoff in the sum of \$30.00 which was paid by George Spiroplos to O. P. Hoff to cover the interest on the mortgage on the Miller land and that with the check was a receipt from Hoff to Spiroplos for the payment of the land. The two instruments were attached together introduced in evidence and marked as Trustee's Exhibit 8.

Witness identified receipt No. 14284 issued by the state treasurer which was a receipt for a remittance made by George Spiroplos to the state treasurer for interest on mortgage on the Miller land the receipt being dated January 10, 1920. The same was offered in evidence and marked as Trustee's Exhibit 9. On cross-examination this witness testified that the book which had not been produced was an old ledger in which Spiroplos assigned a page to

each man, where he wrote down the time that work was started and the rate of pay and that it contained numerous data of various kinds and that practically every transaction that witness asked information about Spiroplos would find some memorandum in the book.

At the close of this witness' testimony after he had been made a witness on behalf of the bankrupts for themselves counsel excused himself in order that he might make up a statement showing from the records and the books of the bankrupts the amount of money [84] that had been paid to the bankrupts by Demas. When this witness was recalled he testified that there was a settlement between Spiroplos Brothers and John Demas in 1918, which was shown by records which he examined at the time that he made up a statement of the accounts of Spiroplos Brothers in 1919 in connection with the settlement with the widow of Nick Spiroplos and that at the time of the death of Nick Spiroplos there was nothing against John Demas on the books of Spiroplos Brothers. At that time Demas owed the bank all of the moneys that he was chargeable with. That the record showed that all indebtedness which Demas had owed Spiroplos Brothers was paid up in full.

The Trustee offered in evidence Trustee's Exhibit No. 10, which was a mortgage by Chas. T. Miller and wife to the State of Oregon in the sum of \$600.00 on the following described premises:

East half (E.1/2) of the Northeast quarter (NE.1/4) of Section 12, Tp. 12 S., R. 44, Lots 1

and 2 and the East half (E. $\frac{1}{2}$) of the Northwest quarter (NW. $\frac{1}{4}$), the Southwest quarter (SW. $\frac{1}{4}$) of the Northeast quarter (NE. $\frac{1}{4}$), Northwest quarter (NW. $\frac{1}{4}$) of the Southeast quarter (SE. $\frac{1}{4}$) Section 7, Tp. 12 S., R. 45 E., W. M.

Mortgage was given on April 15th, 1915.

Trustee offered in evidence Trustee's Exhibit No. 11, a deed from E. Palantas and husband to George Spiroplos, Milton Spiroplos and Gus Spiroplos, covering in addition to other premises the following:

East half (E. $\frac{1}{2}$) of the Northeast quarter (NE. $\frac{1}{4}$) of Section 12, Tp. 12 S., R. 44 E., W. M. East half (E. $\frac{1}{2}$) of the Northwest quarter (NW. $\frac{1}{4}$), Southwest quarter (SW. $\frac{1}{4}$) of the Northeast quarter (NE. $\frac{1}{4}$), and the Northwest quarter (NW. $\frac{1}{4}$) of the Southeast quarter (SE. $\frac{1}{4}$) and Lots 1 and 2 of Section 7, Tp. 12 S., R. 45 E., W. M.

The said deed being dated November 8th, 1919, and being a warranty deed.

Mr. A. A. SMITH called as a witness on behalf of the Trustee, testified as follows:

That at the time the settlement was made between Mrs. Palantas that Mr. Soule was employed by George Spiroplos to prepare a statement of the assets of indebtedness of Spiroplos Brothers, and that in the statement prepared by Soule was included the Miller ranch. That George Spiroplos and Milt Spiroplos both saw the statement and went over it with witness and Mr. Soule. That the

[85] statement included the Miller ranch with a valuation of \$3,000.00 and that in arriving at the amount of money that Mrs. Palantas was entitled to be paid in settlement of her deceased husband's estate which was a portion of the Spiroplos Brothers property, the Miller ranch was considered as an asset belonging to Spiroplos Brothers. That the inventory prepared at the request of George Spiroplos, the administrator of the estate, contained the Miller ranch. On cross-examination this witness testified that at the time of the settlement the Miller ranch had not been mortgaged to the First National Bank. That the sheep belonging to John Demas nor any mortgage on them was considered as an asset of Spiroplos Brothers but that in the settlement it was agreed that Spiroplos Brothers owed John Demas the sum of \$5,000.00 on account of a wrongful credit of a deposit made by the bank.

Mr. CHAS. BODEAU, the Trustee, as a witness on behalf of himself, was called and testified as follows:

That after his election as Trustee he went down to the Spiroplos Brothers' ranch to make an inventory of the property owned by them. That he conferred with George Spiroplos. That subsequent to that time he had had some information about a mower that had not been put in the inventory. That he asked George if there wasn't a new mower on the place. When he made up his inventory he had found only two old mowers. That he asked George if there wasn't a third mower on the place and George replied to him if there was he didn't know

anything about it and he then asked George if there wasn't a new mower there and George said there was not. That the only gas engine that was pointed out was a one-horsepower engine and that no mention was made to him by George Spiroplos about a larger engine. Nothing was said to him about posts. That he inventoried the shearing plant. That he didn't go clear up to the shearing sheds but he asked George if there was anything else up there and George said there was not. That George told him there was no gas engine belonging to the shearing plant. That there was [86] no engine with it.

Mr. WILLIAM POLLMAN was called as a witness on behalf of the Trustee and testified that he was president of the First National Bank and of the Baker Loan and Trust Bank. That he had known George Spiroplos since about 1912. That he knew Milt Spiroplos. That most of the dealings had been with George Spiroplos. That he also knew John Demas five or six years. That Spiroplos Brothers gave to the bank their first mortgage in 1918 and a second one in December, 1919. That the Miller ranch was included in the mortgage given to the bank in 1919. The mortgage was offered in evidence and marked as Trustee's Exhibit No. 13a. The witness also identified a statement covering assets of Spiroplos Brothers which was introduced in evidence and marked as Trustee's Exhibit 14.

That the bank paid the taxes on the Miller land for the year 1920. That about the time the Miller land was purchased the matter was discussed with

him by George Spiroplos. That George Spiroplos was going to buy the land in the name of John Demas so that John Demas could get a reserve right as an owner of lands. That Demas was running sheep at the time on which the bank had a mortgage. That an attempt was made to get on the reserve on the basis of the ownership of the lands but that the right was never allowed by the Government. That the land was not purchased by Demas. That George Spiroplos told him that he was buying the land and was buying the land for himself and that he deeded it to Demas simply to enable Demas to get forest reserve rights and that this conversation came up at the time that George Spiroplos borrowed the money to buy the land. That George Spiroplos had never prior to the time of the bankruptcy **made any claim or any statement** that this land belonged to John Demas.

Upon agreement of counsel the Special Master made a statement to the effect that on June 22, 1921, upon the motion of the [87] attorney for the Trustee the Referee made an order directing the bankrupts to turn over to the Trustee all books of account and other memoranda touching the business heretofore conducted by the bankrupts either as individuals or as partners, a copy of the order being mailed on that date to Spiroplos Brothers at Home, Oregon.

JOHN DEMAS was called as a witness on behalf of the bankrupts and testified that Spiroplos Brothers had the shearing plant and that he had sheep and was shearing them down on their place

and that they made an agreement that Spiroplos Brothers should furnish the shearing plant and he would furnish the engine and he then had Spiroplos Brothers to order the engine and they ordered it and it came. That they bought it and paid for it in the first place and he then settled with them. That he did not order it himself but that Spiroplos ordered it and that he didn't know where they ordered it from or from where it came but that Spiroplos Brothers ordered it and he paid for it. That he had a settlement in 1918 and after that he didn't owe Spiroplos anything. On cross-examination he testified that the settlement which he had with Spiroplos Brothers was in June or July 1918. That at the time of the settlement which took place at the First National Bank, at Baker, he was not present and that he never got together with Nick Spiroplos or George Spiroplos and went over the different accounts. That he was satisfied to take whatever figures Spiroplos Brothers had and accepted their settlement.

That he had nothing whatever to do with the negotiations for the purchase of the gas engine except that he told Spiroplos Brothers to buy the gas engine for him. That he didn't see any member of the sales force of the Kleinschmidt Hardware Company and that he did not himself buy the engine but that the entire transaction was handled by Spiroplos Brothers. [88]

We also desire to have copied in the transcript specifications Nos. 3, 4, 5, 6, 7, and 9 and the answer of the bankrupts, together with the findings of the

Special Master and the objections to findings of Special Master and the order of the Court setting aside the findings of the Special Master and granting the discharge.

A. A. SMITH,
Attorney for Trustee and Appellant.

State of Oregon,
County of Baker,—ss.

Service of a duly certified copy of the foregoing praecipe is admitted at Baker, Oregon, on this 27th day of March, 1923.

PACKWOOD and PACKWOOD,
Attorneys for Bankrupts.

Filed March 29, 1923. G. H. Marsh, Clerk.
[89]

AND AFTERWARDS, to wit, on the 12th day of April, 1923, there was duly filed in said court a statement of the evidence, in words and figures as follows, to wit: [90]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. —.

In the Matter of the Bankruptcy of GEORGE SPIROPLOS, MILTIADES SPIROPLOS and GUST SPIROPLOS, Bankrupts.

Statement of Evidence Under Equity No. 75.

It is stipulated that all testimony taken in connection with proceedings held before the Referee

for the purpose of discovering assets belonging to the bankrupts and touching any of the matters covered by objections to discharge should be included in the testimony taken at the hearing and should be considered the same as if it had been given at the time of the hearing.

Testimony of George Spiroplos, for the Bankrupts.

GEORGE SPIROPLOS, one of the bankrupts, was called as a witness at the hearing to discover assets and testified as follows:

That in the operation of the shearing plant which was operated by Spiroplos Brothers they used an old gasoline engine which was returned from John Demas, the old engine being sold to Mrs. Bastian. That John Demas got the engine from Kleinschmidt, he and Chris Coleman buying it. That George Spiroplos, two years before bought the plant from John Flick and before he bought the place Chris Coleman had a bunch of sheep. That George Spiroplos furnished the plant and everything and Coleman and Demas furnished the engine and they all sheared together. That he did not know when the engine was purchased from Kleinschmidt, something like two or three years. That the engine was taken down to the Frick place when it was first purchased and that was the first that he knew anything about it. That he did not remember the year. [91] That the engine had since been sold to Stanfield by John Demas not very long before the testimony was taken, perhaps a month. That he did not know how much Demas

got for it but he thought a couple of hundred dollars. That the engine had not been concealed down on the river bank since they had gone into bankruptcy but was right in front of the house all the time. That he had recently sold some cattle to Dan Forsea for \$260.00 and that he had deposited the money for the girls and that the cattle belonged to his little girls who inherited them from their mother.

That the mowing-machine which he sold to Forsea belonged to John Demas from the Miller place. That when Charles Bodeau, the Trustee, was on the place for the purpose of making an inventory of the property that he did not show the mowing-machine to Bodeau for the reason that it was on the Miller place. That Demas got the mower with the place when he bought the place from Miller. That the cows and the mowing-machine were not placed in the inventory. That he did not offer to sell the mowing-machine to a man by the name of Dugger. That it was not hid in the brush at that time and that he did not make a price of \$55.00 and that he did not tell Dugger that if he wanted to buy the machine he would give him a bill of sale and date it back a year in order to avoid the bankruptcy and that he did not offer to sell it to Dugger at all and that he talked to no one else about selling it. That he didn't know what kind of a mower it was that he sold to Forsea, didn't know what make it was, didn't know whether it was a McCormick or a different kind. That he turned the money which he

received from the mower over to John Demas a short time before at his camp at Morgan Creek.

He testified that the money received from the cattle was in the bank and when asked in what bank replied that that was a question counsel did not need to know about because the money was spent to buy clothes for the children. That he got the money [92] and spent it for taking care of the children, that he just carried it around, never used a check-book, just carried the \$260.00 around and spent it. That he didn't put it in the bank at all but that he cashed the check at the bank and got the money.

Mr. SPIROPLOS was later called as a witness for the purpose of discovering assets and testified as follows:

That the mower which was sold to Dan Forsea was in the field and that John Demas had placed it there the previous fall. That the mower was on the Miller place about three years previously when he bought the Miller place but that it had been brought down to the Flick Ranch *and* year before by Demas. That he brought it down from the place some time in 1920. He didn't know just when as he wasn't there. That he saw it on the place for the first time in the spring of 1921. That John Demas told him it was on the place. That he didn't tell Dan Forsea who the mower belonged to when he sold it. Dan Forsea asked no questions. That he told Forsea he had a mower and team and harness to sell. That he told Forsea where the mower was and that they went down and looked

at it and Forsea paid \$50.00 for the mower. That he did not offer to sell this particular mower to Mr. Dugger but that he offered to sell him a different mower. That he had two mowers to sell and offered to sell Dugger another one. He denied that he told Dugger that the mower was hid away in the brush and that it was a new mower that had just been purchased and denies that he offered to date the bill of sale back a year in order to avoid the date of bankruptcy.

He testified that Demas owned the Miller place, that he didn't have anything to do with it, that it belonged to Demas, and admits that Spiroplos paid for the place and that he gave the mortgage to the First National Bank on it and that he included the place in the inventory of the Nicholas Spiroplos [93] estate as belonging to Spiroplos Brothers.

That the gasoline engine was bought after Spiroplos Brothers had bought the place from John Flick. That they had an old engine from the Flick place but that it was too big for the shearing plant and that Spiroplos Brothers furnished the shearing plant, Chris Coleman and John Demas bought the gasoline engine and they didn't charge each other anything for the use of the plant. Spiroplos Brothers furnished the shearing plant and the other two men the gasoline engine. That he sold the engine to Gerald Stanfield for \$200.00. That he paid the \$200.00 to John Demas.

It was stipulated that without identification by the Clerk all deeds, mortgages, and papers in con-

nection with the estate of Nicholas Spiroplos, deceased, might be introduced. The Trustee introduced in evidence the schedule filed by the bankrupts with their application to be adjudicated bankrupts and particularly Schedule B-1, the first item in Schedule B-4, the oath to the same, the title and heading to the same, the portions particularly introduced being as follows:

Schedule B-1.
REAL ESTATE.

Flick Ranch at Home, Ore., described as follows: Lot 2, W $\frac{1}{2}$ of SW $\frac{1}{4}$, SE $\frac{1}{4}$ of SW $\frac{1}{4}$, and SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 15, and Lots 1, 2 and 3, and E $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 22, all in Tp. 12, S. R. 45 E. W. M., in Baker County, Ore.

Incumbered by mortgage to First National Bank at Baker City, Oregon, for \$71000.00 Dec. 10, 1919.

This real estate mortgage was given to secure the payment of certain notes inadequately secured by Chattel mortgages and covers other property hereinafter more particularly described.

20,000.00

George S. Spiroplos Homestead, about six miles from Home, Ore., described as follows:

Covered by mortgage above described.

Same as stated above.

1,000.00

N $\frac{1}{2}$ of SW $\frac{1}{4}$, W $\frac{1}{2}$ and SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 22, E $\frac{1}{2}$ of NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 27, all in Tp. 11, S. R. 45 E. W. M. in Baker County, Ore.

Total

\$21,000.00

(Signed) GEORGE SPIROPLOS,
MILTIADES SPIROPLOS.
GUST SPIROPLOS.

Schedule B-4.

Property in Reversion, Remainder, or Expectancy,
Including Property Held in Trust for the
Debtor or Subject to any Power or Right to
Dispose of or to Charge.

Interest in land. NONE.

(Signed) GEORGE SPIROPLOS,
MILTIADES SPIROPLOS.
GUST SPIROPLOS.

OATH TO SCHEDULE B.

United States of America,
District of Oregon,
County of Baker,—ss.

On this 20th day of October, A. D. 1920, before me personally came George Spiroplos, Miltiades Spiroplos and Gust Spiroplos the persons mentioned in and who subscribed to the foregoing Schedule (marked B-1, 2, 3, 4, 5, 6,), and who, being by me first duly sworn, did declare the said schedule to be a statement of all their estate, both real and personal, in accordance with the Acts of Congress relating to bankruptcy.

(Signed) GEORGE SPIROPLOS.
MILTIADES SPIROPLOS.
GUST SPIROPLOS.

Subscribed and sworn to before me this 20th day of October, A. D. 1920.

J. L. SOULE,

Notary Public for Oregon.

My Commission expires April 29, 1921.

The Trustee offered in evidence statement made by George Spiroplos one of the bankrupts to the First National Bank of Baker in connection with his application for a loan from that Bank. The exhibit so far as the same effects any question at issue is as follows: [95]

“To the First National Bank of Baker City, Oregon.

“For the purpose of obtaining credit with you from time to time we herewith submit the following as being a fair and accurate statement of our financial condition on November 27, 1918.

Description of Real Estate.

J. W. Flick ranch near Home, Oregon, about 330 acres.

McWaters 160, near Home, Oregon.

Miller Place near Home, Oregon, stands in name of John Demas, \$2,700.00.

(Signed) GEORGE SPIROPLÖS.”

The Trustee offered in evidence the Inventory and Appraisement in the estate of Nicholas Spiroplos, deceased, portion of which effects the issue in this case being as follows:

Also an undivided one-fifth interest in what is known as the Miller ranch now standing in the name of John Demas and described as follows:

E.1/2 of the NE.1/4 of Section 12, Tp. 12 S.,
 R. 44 E., W. M.; E.1/2 of NW.1/4, SW.1/4
 of NE.1/4, NW.1/4 of SE.1/4, and Lots 1
 and 2, all in Section 7, Tp. 12 S., R. 45
 E., W. M. \$200.00.

State of Oregon,
County of Baker,—ss.

George Spiroplos, the administrator of the estate of Nicholas Spiroplos, deceased, being duly sworn says: That the annexed inventory contains a true statement of all the real and personal property of the said deceased, which has come into my knowledge and possession and particularly of all money belonging to the said deceased and all just claims of the said deceased against the said ———.

GEORGE SPIROPLOS.

Subscribed and sworn to before me this 11th day of January, A. D. 1919.

JAMES H. NICHOLS,
Notary Public for Oregon.

My Commission expires Nov. 29, 1919.

The Trustee offered in evidence the first semi-annual report of George Spiroplos, one of the bankrupts and administrator of estate of Nicholas Spiroplos, deceased, the same so far as it effects any issue in this case being as follows: [96]

“That the following is a true and correct copy of the Inventory and Appraisement of said estate in so far as the list of property embraced is covered, to wit:

Together with other property not involved herein.

Also an undivided one-fifth interest in what is known as the Miller ranch now standing in the name of John Demas and described as follows:

E.1½ of the NE.¼ of Section 12, Tp. 12 S., R. 44 E., W. M., and Lots 1 and 2, and E.1½ of NW.¼,

SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, all of Section 7, Tp. 12 S., R. 45 E., W. M.

(Signed) GEORGE SPIROPLOS,
Administrator and Petitioner Making Report.

State of Oregon,
County of Baker,—ss.

I, George Spiroplos, being first duly sworn, say: That I am the duly appointed, qualified and acting administrator of the estate of Nicholas Spiroplos, deceased, and the petitioner who signed the above and foregoing report; that I have read the same, know the contents thereof and that the facts therein set forth are true as I verily believe.

(Signed) GEORGE SPIROPLOS.

Subscribed and sworn to before me this 19th day of July, 1919.

(Signed) EDWARD A. LANDIS,
Notary Public for Oregon.

My Commission expires June 5th, 1921.

The Trustee offered in evidence the final account and report of George Spiroplos, one of the bankrupts, as administrator of the estate of Nicholas Spiroplos, deceased, the portion of the same so far as it effects any issue in this case being as follows:

“That the said property of said deceased also consisted of an undivided one-fifth interest in and to the real and personal property of Spiroplos Brothers, a partnership consisting of your administrator owning an undivided one-fifth interest therein, Milt Spiroplos owning an undivided one-fifth interest therein, Gust Spiroplos owning an undivided

one-fifth interest therein, James Spiroplos owning an undivided one-fifth interest therein.”

“That on or about the month of April, 1919, Elene Spiroplos, widow of the said Nicholas Spiroplos, and his sole heir at law, married one Nick Palantas, and that the said Nick Palantas after his marriage to the said Elene Spiroplos commenced to take an active interest in the affairs of Spiroplos Brothers, and for and in behalf of his said wife made frequent demands upon your administrator for a settlement of said estate and for a disposition of the share of his wife as the heir at law of the said [97] Nicholas Spiroplos, deceased; that said demands were unreasonable and unwarranted and impossible of performance on the part of your administrator and that he was unable to arrive at a settlement with said Palantas of the interest of the said Elene Spiroplos in the estate of her husband and that on the 9th day of October, 1919, the said Elene Spiroplos Palantas acting under the direction of her said husband filed in this court and in the matter of said estate her duly verified petition complaining of the manner in which the estate of said deceased was being administered and alleging that large sums of money belonging to the same were not accounted for and that your administrator was attempting to defraud the said estate out of a large sum of money, and in said petition so filed said petitioner prayed for a hearing on said petition and for an order requiring your administrator to file a detailed statement showing all receipts and disbursements since the death of Nicholas Spiroplos;

that he be discharged as administrator and a suitable person appointed by the Court to complete the administration of said estate; that thereafter and on the 9th day of October, 1919, an order was duly given, made and entered in said matter, requiring your administrator to appear before the above-entitled court on the 27th day of October, at the hour of ten o'clock A. M. and at said time show cause, if any, why he should not be discharged as administrator of said estate, and that at said time he should also show cause why he had not filed a complete statement and account of his transactions as he was requested to file in said petition; that thereafter negotiations for the settlement of all controversies between the said Elene Spiroplos Palantas and your administrator were entered into between the said Elene Spiroplos Palantas and her attorneys, Messrs. Robert F. Maguire of Portland, Oregon, and A. A. Smith of Baker, Oregon; and Messrs. John L. Rand and James H. Nichols, attorneys for your administrator, with the result that your administrator procured the services of one J. L. Soule and submitted to him all of the accounts, checks, notes, data and generally all records in his possession covering all of the transactions of Spiroplos Brothers, and particularly the transactions had by your administrator in connection with the administration of the individual and partnership estate of Nicholas Spiroplos, deceased, to the end and for the purpose that the said J. L. Soule might make an analysis thereof and determine the value of the interest of the said Elene Spiroplos Palantas

as the heir at law of the said Nicholas Spiroplos, deceased, that attached hereto and by reference thereto made a part hereof is a true and correct copy of the final analysis and synopsis made by the said J. L. Soule and showing the net value of the entire holdings of Spiroplos Brothers, of which the estate of the deceased, Nicholas Spiroplos, was the owner of an undivided one-fifth; that all of the data used in preparing said analysis and statement was submitted to the said Elene Spiroplos Palantas and to her attorneys, with the result that on the 8th day of November, 1919, a settlement of all matters and things in controversy between said George Spiroplos and herself was had and George Spiroplos, your administrator, in his individual capacity, Milt Spiroplos and Gust Spiroplos purchased all of the right, title, interest and claim of the said Elene Spiroplos Palantas as sole heir at law of Nicholas Spiroplos, deceased, in and to all of the personal property belonging to the copartnership of George Spiroplos, Milt Spiroplos, Gust Spiroplos, James Spiroplos and Nicholas Spiroplos, deceased, including all notes, bills, and accounts receivable, demands, credits, choses in action and all personal property of the estate of Nicholas Spiroplos, deceased, and at said time the said Elene Spiroplos Palantas made, executed and delivered to the purchasers of said personal property above named her certain bill of sale conveying the property above mentioned to them; that at [98] the time and as a part of said transaction and settlement the said Elene Spiroplos Palantas made, executed and delivered her certain

deed of conveyance, her husband joining therein, conveying to George Spiroplos, Milt Spiroplos and Gust Spiroplos all of their right, title and interest in and to all of the real property belonging to the firm of Spiroplos Brothers, consisting of what is known as the Flick ranch, the Miller ranch and the Mc-Waters ranch, and any and all other real property which may thereafter be found to belong to said partnership."

In statement attached to above account prepared by Soule, included among assets is the following:

Miller ranch.....	\$1600.00
Mortgage.....	600.00

State of Oregon,
County of Baker,—ss.

I, George Spiroplos, being first duly sworn, depose and say: that I am the duly appointed, qualified and acting administrator of the individual and partnership estate of Nicholas Spiroplos; that I have read the foregoing final account and report and know the contents thereof and that the same is true as I verily believe.

(Signed) GEORGE SPIROPLOS.

Subscribed and sworn to before me this 22d day of January, 1920.

(Signed) JAMES H. NICHOLS.

My Commission expires 12/5/23.

The Trustee offered in evidence the contract between the widow of Nicholas Spiroplos and the firm of Spiroplos Brothers, which included the three

bankrupts, the said exhibit so far as the same effects any issue in this case being as follows:

“This contract made and entered into this 8th day of November, 1919, by and between Elene Palantas, the widow of Nicholas Spiroplos, who died November 8, 1918, in Baker county, Oregon, and was a full member of the firm of Spiroplos Brothers, and Nick Palantas, her husband, of Baker county, Oregon, the party of the first part, and George Spiroplos, Milt Spiroplos, Gust Spiroplos and James Spiroplos, who together with said deceased conducted the firm of Spiroplos Brothers, doing business in Baker county, Oregon, the party of the second part, and George Spiroplos, administrator of the estate of Nicholas Spiroplos, deceased, the party of the third part, WITNESSETH:

THAT WHEREAS, Nicholas Spiroplos, a member of said firm, died on November 8, 1918, leaving as his sole heir at law the said Elene Spiroplos, now Elene Palantas, and said firm of Spiroplos Brothers were the owners of a large amount of both real and personal property and were indebted in large sums of money at the time of the death of said deceased, and [99]

WHEREAS, the said Elene Palantas at this time desires to sell her interest in said partnership assets and to be released from all obligations of said firm;

NOW, THEREFORE, in consideration of the sum of Seven Thousand (\$7,000.00) Dollars, to her in hand paid, the receipt of which is hereby

acknowledged, the said parties of the first part do hereby covenant and agree as follows:

The parties of the first part shall make, execute and deliver to George Spiroplos, Milt Spiroplos and Gust Spiroplos, parties of the second part, a good and sufficient deed conveying to said parties all the right, title and interest of the parties of the first part in and to all of the real property belonging to said firm, consisting of what is known as the Flick ranch, the Miller ranch and the McWaters ranch.

(Signed) ELENE PALANTAS.

NICK PALANTAS.

MILT SPIROPLOS,

By GEORGE SPIROPLOS.

GUST SPIROPLOS,

By GEORGE SPIROPLOS.

JAMES SPIROPLOS,

By GEORGE SPIROPLOS.

GEORGE SPIROPLOS.

GEORGE SPIROPLOS,

Administrator."

The Trustee offered in evidence a mortgage from the bankrupts to the First National Bank, given on the 19th day of December, 1919, the portion of the same so far as it effects any issue in this case being as follows, to wit:

"Now, Therefore, in consideration of said loan and for the purpose of securing the payment of each and all of said notes above described and the faithful performance of all of the covenants herein contained, the parties of the first part do hereby grant, bargain, sell and convey unto the said party of the

second part, its successors and assigns forever, all of that certain real estate situate in Baker county, and State of Oregon, described as follows, to wit:

* * * * *

East half (E.1/2) of the Northeast quarter (NE.1/4) of Section 12, Tp. 12 S., R. 44 East of Willamette Meridian; East half (E.1/2) of the Northwest quarter (NW.1/4), Southwest quarter (SW.1/4) of the Northeast quarter (NE.1/4), Northeast quarter (NE.1/4) of the Southeast quarter (SE.1/4), and Lots 1 and 2 of Section 7, all in Tp. 12 S., R. 45 East of Willamette Meridian. [100]

* * * * *

TO HAVE AND TO HOLD the said premises and the appurtenances and waters and water right, water privileges and ditches to the said party of the second part, its successors and assigns forever.

And the said parties of the first part covenant that the said George Spiroplos, Milton Spiroplos and Gust Spiroplos are the owners in fee simple of the above described premises and that they will warrant and forever defend the same against the lawful claims of all persons whomsoever, save and except as to said existing mortgages;

* * * * *

PROVIDED NEVERTHELESS, that this conveyance is intended to be a real and chattel mortgage upon the lands above described and personal property above described to secure the payment of

each and all of said promissory notes above described.

(Signed) GEORGE SPIROPLOS.
MILTON SPIROPLOS.
GUST SPIROPLOS.

Duly and regularly acknowledged by George Spiroplos and Milton Spiroplos on December 1st, 1919, before Joseph J. Heilner, Notary Public for Oregon, and by Gust Spiroplos, on the 19th day of December, 1919, before O. H. P. McCord, Notary Public."

The Trustee offered in evidence the receipts from State Treasurer for interest on mortgage held by State on Miller land for years 1919 and 1920, the same being as follows:

STATE TREASURER'S RECEIPT AND
STATEMENT IN DUPLICATE.

No. 14284.

State of Oregon,
Treasury Department.

Remitted by:

Geo. Spiroplos,
c/o First National Bank,

Receipt mailed to same.

P. O. Address: P. O. Box 256. P. O. Address, 356.

Date of letter—Baker, Oregon.

Jan. 10, 1920.

Received from Chas. T. Miller, Baker
county, Jan. 10, 1920, the sum of Eighteen
and

\$18.00,

which has been applied as follows:

Common School, interest—Interest on note

No. 12789 to Dec. 12, 1919

\$18.00.

Received payment,

O. P. HOFF,
State Treasurer.

Countersigned:

BEN W. OLCOTT,
Secretary of State. [101]

STATE TREASURER'S RECEIPT AND
STATEMENT IN DUPLICATE.

State of Oregon,
Treasury Department.

No. 21061.

Remitted by:

Geo. S. Spiroplos,
Home, Oregon.

Receipt mailed to same.

June 23, 1920.

355.

Received from Chas. T. Miller, Baker
county, the sum of Eighteen and \$18.00,
which has been applied as follows:

Assumed \$600.00 Mortgage.

Common School, interest—Interest on note

No. 12789 to June 12, 1920

\$18.00.

\$12.00 refund enclosed by check No. 4974.

Received payment,

O. P. HOFF,
State Treasurer.

Countersigned:

SAM A. KOZER,
Secretary of State.

The Trustee offered in evidence check from George Spiroplos to State Treasurer under date of June 18, 1920, paying interest on mortgage to State on Miller land, the said check being as follows:

GEO. S. SPIROPLOS & BROS.

Home, Oregon.

No. 219.

June 18, 1920.

Pay to the order of O. P. Hoff, State Treasurer,
\$30.00 Thirty and No/100 Dollars.

GEO. S. SPIROPLOS.

To the First National Bank 96-28 Baker, Oregon.

Testimony of John Demas, for the Bankrupts.

JOHN DEMAS was called as a witness by the bankrupts in connection with the examination to disclose assets, who testified as follows:

That he had been connected with Spiroplos Brothers for the years 1916 to 1918, at which time he paid all his debts and after that time he took care of himself and that after 1918 he [102] financed his own operations. That he and Chris Coleman bought the gasoline engine, George Spiroplos owning the shearing plant. That George promised to furnish the shearing plant and he and Chris Coleman furnish the gasoline engine and that he bought the gasoline engine in 1919 from Kleinschmidt Hardware Company, paying \$300.00, using his own money to pay for it. That he told George Spiroplos to sell the gasoline engine for him about the 1st of May, 1921. That he talked to D. W. Dugger about a mower that George Spiroplos was trying to sell

(Testimony of John Demas.)

to Dugger and that when he talked to Dugger he thought that George was trying to sell Dugger an old mower that was on the Miller place, but that he knew that the mower that Dugger was trying to buy and the mower that he was talking to Dugger about was the mower that he, Demas, owned, and that he found out afterwards that the mower George was trying to sell to Dugger was the mower that he claimed to have written to George to sell. That he bought the gas engine in 1919—some time in the early part of April. *That he paid cash for his share and Chris Coleman paid for his share by check. That he and Chris Coleman bought it together and he paid cash and Chris Coleman paid check and that afterwards Chris Coleman turned his interest over to him, Demas, and had no more interest in it.*

At the close of this testimony counsel for bankrupts asked whether or not there would be any claim that the money which had been furnished by Spiroplos to purchase the Miller place had not been repaid, because if there was such claim bankrupts desired to call the officers of the First National Bank of Baker to show that the land was purchased for Demas and that Demas owned it,

Counsel for Trustee notified counsel for bankrupts that the claim would be made that the Miller place was the property of the bankrupts and should have been included in the schedule of assets. [103]

Testimony of Mrs. McBirney for the Trustee.

Mrs. McBIRNEY was called as a witness to testify on behalf of the Trustee and testified as follows:

That she resided at Nampa, Idaho, and during the year 1919 was bookkeeper for the Eastern Oregon Hardware Company, which previously had been doing business as the Kleinschmidt Hardware Company. That the original notation of charges was made by salesman and that she transferred from the sales slips to the bills and then from the bills to the books of the Company on the day that the sale was made. The transfer to the customers ledger being made on the first of each month. Witness identified slips exhibited to her as entries made by her on the books of the Company charging the account of Spiroplos Brothers. These slips were offered in evidence and marked as Trustee's Exhibit 2 and are in words and figures as follows:

Trustee's Exhibit 2.**SPIROPLOS BROS.**

Home, Oregon.

				April,
40	2	Express .....		.85
41		2-32x4 Federal tire)		
		1-28252)	57.45.....	114.90
		1-20379)		
2	B	2 Buckets		1.10
		2 Buckets		1.30

		12- $\frac{3}{8}$ x2 $\frac{1}{2}$ Bolt	.39
		12- $\frac{3}{8}$ x3 "	.42
		12-7/16x3 $\frac{1}{2}$ "	.54
		12-5/16x4 $\frac{1}{2}$ "	.42
		12 Plow Bolts	.60
		1 Bucket	.60
		1 wrench	.50
62	3	647 Alfalfa Seed \$25.00 per 100	161.75
130	7	6-410 Raw Hide pinions	16.50
		12-406 strings	.72
		1-403 Clutch lever	1.10
		1-412 Clutch Spindle	1.65
		3-429-C Yokes $\frac{1}{2}$ S	6.60
		1-411 Long Spindle	1.10
		2-416 Short Spindle	2.20
		24-432 Joint Cogs	15-84
		12 D. Joint guards	2.04
		Parcel Post	.35
151	7	1-6 H. P. Alamo Engine	270.20
		Frt. Baker to Home.....	8.25
		1-2 Glass oil cup	3.25
[104]			
		1-3 Glass oil cup	3.75
		1-14 Pipe wrench 2.50 postage.	
		10	2.60
<hr/>			
		Forward	619.52

Charles Bodeau vs.
SPIROPLOS BROS.
 Home, Oregon.

		April.
Forward		\$619.52
274 17	2 Doz. 50 Tea Spoons	4.00
	1½ Doz. Table Spoons	1.75
	2 set knives and forks	7.00
	1 knife	7.00
	I doz. 2 oiler	3.00
	15 Gal. P. M. Oil	14.70
	1-15 Gal. drum	3.00
	5 cup grease .....	.65
	1 kettle	2.00
	I kettle	2.75
	2 bx. 22 shorts .....	.60
	12 tea cups and saucers	4.50
	12 coffee cups and saucers	5 50
	1 28 wash basin .....	.40
	3 30 Wash basins	1.50
	4 vegetable dishes	2.80
	1 bucket	1.25
	1 bucket .....	.60
	I pitcher	3.50
	6 plates	1.25
275 17	6 pkg. garden seed .....	.90
	14 pkg. garden seed	1.05
	3 pkg. flower seed .....	.30
322 19	prepaid freight	2.47
356 21	1-9 H. P. Alamo Engine	453.00
	Freight	27.50

\$1166.39

(Testimony of Mrs. McBirney.)

Witness was then handed the ledger of the Klien-schmidt Hardware Company to which the items found on Trustee's Exhibit 2 were posted. On page 31 of this ledger under the letters "SI" was found the account of Spiroplos of Home, Oregon, and that this contained the items found on Exhibit 2 transferred on the 30th of April, 1919. Page 33 of the ledger is a continuation of the Spiroplos account found on page 31. These two ledger sheets were offered in evidence, admitted and marked as Trustee's Exhibit 3. The portion of these sheets showing the charge for the items in Trustee's Exhibit 2 is as follows: [105]

Date	Description	Folio	Debits	Date	Description	Folio	Credits
8/31	Mdse.	B. B.	5.32	12/19	C. B.	35	491.60
10/31	"	" "	47.35	12/20		J145	25.07
11/30	"	" "	387.70				
11/30	" to John S.	2 B.	5.60				
9/30	" " Geo. S.	10 B.	13.25				
10/31	" " Milt S.	27 B.	57.45				
			516.67				516.67
12/30		B. B.	19.70	2/6	C. B.	43	184.60
1/31		" "	174.94	"/10	J1	149	10.04
2/28		" "	35.89	3/10		J154	41.25
3/31		" "	70.32	4/21		J159	278.45
4/30		" "	1166.39	7/8		J169	13.18
5/31		" "	98.39	" "		70	1058.23
7/31		" "	147.05				
8/30		" "	44.10				

That item 151 shown on Exhibit 2 is a six-horse-power Alamo gas engine sold to Spiroplos Brothers for \$270.20, shipped to Spiroplos Brothers through the P. & O. Plow Company from Nampa, Idaho. That the item of \$278.45 shown on the credit side of the account under date of April 21st

represents the return of the six-horsepower engine and upon its return credit for that amount was given which included the purchase price and freight charges. That the item of \$453.00 in Exhibit No. 2 charged under date of April 29, was a nine-horsepower Alamo engine which was shipped by the company to Spiroplos Brothers. Witness was handed a check in the sum of \$1058.23, which she testifies as having been paid to the Eastern Oregon Hardware Company by George Spiroplos, which was paid to that company in settlement of the account of Spiroplos Brothers and that this is the same item that appears in the ledger of that company as a credit in that sum of money and that the payment of that sum of money paid up Spiroplos Brothers' account in full. This check was offered in evidence and marked Trustee's Exhibit 4, and is as follows: [106]

Trustee's Exhibit 4.

3029

GEORGE SPIROPLOS,

Dealer in Sheep,

Home, Oregon, July 8, 1919. No. 223.

Pay to the order of Eastern Oregon Hardware Co. \$1058 23/100 Ten Hundred Fifty-eight and 23/100 Dollars.

GEO. S. SPIROPLOS.

To the First National Bank, Baker, Oregon.

96-28,

Hardware supplies.

Witness identifies an account carried by John Demas with the Eastern Oregon Hardware Company.

(Testimony of V. E. Daniels.)

This account was introduced in evidence and received as Trustee's Exhibit 5, and extends from the 15th of March, 1918, to the 30th of August, 1919. There is no gas engine charged on the account. The aggregate of all debit items is \$83.20 covering the entire period of time.

Testimony of V. E. Daniels, for the Trustee.

V. E. DANIELS was called as a witness on behalf of the Trustee and testified as follows:

That in the month of April, 1919, he was salesman for the Eastern Oregon Hardware Company, formerly the Kleinschmidt Hardware Company, and that as salesman he talked to George Spiroplos in connection with the sale of a gas engine. That this was in the spring of 1919 prior to the 7th day of April. That he discussed the sale of the gas engine with George Spiroplos and with no one else. That he went down to the ranch of Spiroplos Brothers on Snake River for the purpose of selling a gas engine. That a sale was later made to George Spiroplos of a six-horsepower Alamo gas engine, which was shipped from Idaho through the P. & O. Plow Company, the sale being made by him on behalf of the Eastern Oregon Hardware Company, which company subsequently sold out and was dissolved, the books having been placed in the possession of Nichols & Hallock a firm of attorneys at Baker. That he had made a search of the records to find the original sales slip but that it had been lost in closing up the affairs of the company.

(Testimony of V. E. Daniels.)

On cross-examination he testified that the first engine sold was a six-horsepower engine which was sent down to Spiroplos [107] Brothers and returned. That later a 9-horsepower engine was sent.

Testimony of D. W. Dugger, for the Trustee.

Mr. D. W. DUGGER was called as a witness on behalf of the Trustee and testified as follows:

That he lived on Hibbard Creek about four miles from Snake River and about six miles from Home, Oregon. That he was acquainted with George Spiroplos and with John Demas. That he lived on what is known as the McWaters place on Hibbard Creek which at one time was owned by Spiroplos Brothers. That about the 31st of March, 1921, he had a conversation with George Spiroplos relative to the purchase of a mowing-machine, this conversation taking place on the Flick place or the Spiroplos place. That at that time Spiroplos asked him if he wanted to buy a mower or sulky plow and he replied that he didn't need a plow but he needed a mowing-machine and asked Spiroplos what kind of a mowing-machine he had for sale. Spiroplos answered that it was a McCormick and had been run one season and that he asked Spiroplos if it was on the schedules of property turned in by Spiroplos in his bankruptcy proceedings and Spiroplos replied no. That Spiroplos told Dugger that he would sell Dugger the mowing-machine and give him a bill of sale and date it back a year so that there would be no conflict

(Testimony of D. W. Dugger.)

with the bankruptcy proceedings. That he asked Spiroplos if he might look at the mowing-machine and Spiroplos replied that he had put it away in the brush. That this conversation took place in the road just in front of the house on the Flick place. That at that time there were two old mowers standing near the barn and that the mower which Spiroplos proposed to sell to him was neither of the two standing by the barn. That Spiroplos did not tell him the exact place where the mower was but told him that Spiroplos had it hid in the brush. That he was afraid to buy the mower just that way and he came to Baker and went to see the banker and was directed to see the Trustee in Bankruptcy. That he went to see the Trustee in Bankruptcy relative to the matter. That he did not buy the mower. That the [108] reason he asked Spiroplos as to whether or not this was in the list of property that had been turned in by Spiroplos at the time of his bankruptcy was because at another time he was considering purchasing a horse from Spiroplos and asked Mr. Baker, a neighbor of his, if it was safe to buy the horse from Spiroplos and Mr. Baker told him that it depended on whether or not the horse was named in the list and asking Mr. Baker what list he meant was told that at the time of the bankruptcy the bankrupt had to make a correct list of all his property and turn it into the court. That he presumed the reason that Spiroplos tried to sell him the mower and offered to date back the bill of sale was because he, Spiroplos,

(Testimony of D. W. Dugger.)

knew that Dugger needed a mower on his place and that it was a chance to sell it.

That John Demas stopped at his place shortly subsequent to the time of the conversation between witness and Spiroplos and told witness that he was talking about things that didn't concern his business and didn't hurt him any which witness thought was in reference to the fact that the witness had come to Baker to find out about the right of Spiroplos to sell the mower and Demas told witness that the mowing-machine which Spiroplos was trying to sell to witness belonged to Demas. That when he, Demas, bought the Miller place two years before, the mowing-machine went with the place and that he loaned the mowing-machine to George Spiroplos and that he took it down on his place and never returned it.

Testimony of H. P. Swisher, for the Trustee.

Mr. H. P. SWISHER, called as a witness on behalf of the Trustee, testified as follows:

That he lived on Hibbard Creek and was in the cattle business and had a small ranch on that creek. That he was acquainted with George Spiroplos for about three or four years. That he knew where the Miller place was. That in May, 1921, he bought some posts from Spiroplos which were on the Miller place, for which he agreed to pay twelve cents a piece or to replace them and that he got 216 posts. That the posts were near the Miller place and had been cut three or four years, juniper posts.

(Testimony of H. P. Swisher.)

On cross-examination he testified that he didn't know who had [109] occupied the Miller place the year previous. That there was no one living there but that there had been sheep on the place in the spring, the sheep belonging, he supposed, to George Spiroplos. That if he didn't replace the posts that he would have to pay for them and that he expected to pay George Spiroplos. That the posts were on the Miller place prior to the time that it was purchased and that they were cut on the Miller place.

Testimony of D. L. Forsea, for the Trustee.

Mr. D. L. FORSEA was called as a witness on behalf of the Trustee and testified as follows:

That he lived on Mr. Baker's ranch or the Flick place. That on March, 1921, he bought some cattle from George Spiroplos paying him \$260.00. That he bought three cows, a steer, two yearlings and two calves. George Spiroplos sold the cattle to him and that he paid George Spiroplos with a check. The check was identified by the witness, offered in evidence as Trustee's Exhibit 6, and is as follows:

Trustee's Exhibit 6.

Baker, Oregon, 3-18, 1921, No. —.

Baker Loan & Trust Company—96-30.

Baker, Oregon.

Pay to the order of George Spiroplos \$260.00
Two Hundred Sixty and No/100 Dollars.

D. L. FORSEA.

(Testimony of D. L. Forsea.)

That later he bought a team, harness and mowing-machine for which he paid \$150.00. That he bought this property from George Spiroplos and paid George Spiroplos with a check. The check was identified, offered in evidence and marked as Trustee's Exhibit 7 and is as follows:

Trustee's Exhibit 7.

Baker, Oregon, April 11, 1921. No. —.

Baker Loan & Trust Company—96-30.

Baker, Oregon.

Pay to the order of George Spiroplos \$150.00
One Hundred Fifty and no/100 Dollars.

D. L. FORSEA.

That the mower was a five and a half foot cut McCormick mower. [110] That at the time that he bought it it was at the lower end of the field on the river bank below the bank in a clump of trees. That where the mower was is a big bank which you went around to get to the mower. There was a big bunch of brush on the side of the mower and that in getting to the mower you went in a northeasterly direction from the buildings and had to go north of the big bank to get to the mower. That he saw the mower there the day he bought it. That there is no farming land where the mower was but there is farming land above the mower. That there is no farming land between where the mower was and the river and none below the bank behind which the mower was found.

Testimony of J. L. Soule, for the Trustee.

J. L. SOULE, called as a witness on behalf of the Trustee, testified as follows:

That he had been employed by Spiroplos Brothers from some time previous to their bankruptcy and had supervision over their books. That he turned over to the Trustee in Bankruptcy all of the books and records of Spiroplos Brothers that he had in his possession. That there was one book which was kept by George Spiroplos and which contained certain information about the business of Spiroplos Brothers which was not with the books turned over by him to the Trustee. That the last he saw this book it was in the possession of George Spiroplos.

The witness identified a check given June 18, 1920, by George Spiroplos to O. P. Hoff in the sum of \$30.00, which was paid by George Spiroplos to O. P. Hoff to cover the interest on the mortgage on the Miller land and that with the check was a receipt from Hoff to Spiroplos for the payment of the land. The two instruments were attached together introduced in evidence and marked as Trustee's Exhibit 8.

Witness identified receipt No. 14284, issued by the state treasurer, which was a receipt for a remittance made by George Spiroplos to the state treasurer for interest on mortgage on the Miller land the receipt being dated January 10, 1920. The same [111] was offered in evidence and marked as Trustee's Exhibit 9.

(Testimony of J. L. Soule.)

On cross-examination this witness testified that the book which had not been produced was an old ledger in which Spiroplos assigned a page to each man, where he wrote down the time that work was started and the rate of pay and that it contained numerous data of various kinds and that practically every transaction that the witness asked information about Spiroplos would find some memorandum in the book.

At the close of this witness' testimony, after he had been made a witness on behalf of the bankrupts for themselves, counsel excused him in order that he might make up a statement showing from the records and books of the bankrupts the amount of money that had been paid to the bankrupts by Demas. When this witness was recalled he testified that there was a settlement between Spiroplos Brothers and John Demas in 1918, which was shown by records which he examined at the time he made up a statement of the accounts of Spiroplos Brothers in 1919 in connection with the settlement with the widow of Nick Spiroplos and that at the time of the death of Nick Spiroplos there was nothing against John Demas on the books of Spiroplos Brothers. At that time Demas owed the bank all of the moneys that he was chargeable with. That the record showed that all indebtedness which Demas had owed Spiroplos Brothers was paid up in full.

The Trustee offered in evidence Trustee's Exhibit No. 10, which was a mortgage by Chas. T. Miller

(Testimony of A. A. Smith.)

and wife to the State of Oregon in the sum of \$600.00 on the following described premises:

East half (E.1/2) of the Northeast quarter (NE.1/4) of Section 12, Tp. 12 S., R. 44, Lots 1 and 2, and the East half (E.1/2) of the Northwest quarter (NW.1/4), the Southwest quarter (SW.1/4) of the Northeast quarter (NE.1/4), Northwest quarter (NW.1/4) of the Southeast quarter (SE.1/4), Section 7, Tp. 12 S., R. 45 E., W. M. Mortgage was given on April 15th, 1915.

Trustee offered in evidence Trustee's Exhibit No. 11, a deed from E. Palantas and husband to George Spiroplos, Milton Spiroplos and Gus Spiroplos, covering in addition to other premises the following:
[112]

East half (E.1/2) of the Northeast quarter (NE.1/4) of Section 12, Tp. 12 S., R. 44 E., W. M. East half (E.1/2) of the Northwest quarter (NW.1/4), Southwest quarter (SW.1/4) of the Northeast quarter (NE.1/4), and the Northwest quarter (NW.1/4) of the Southeast quarter (SE.1/4) and Lots 1 and 2 of Section 7, Tp. 12 S., R. 45 E., W. M.

The said deed being dated November 8th, 1919, and being a warranty deed.

Testimony of A. A. Smith, for the Trustee.

Mr. A. A. SMITH, called as a witness on behalf of the Trustee, testified as follows:

That at the time the settlement was made between Mrs. Palantas that Mr. Soule was employed by George Spiroplos to prepare a statement of the

(Testimony of A. A. Smith.)

assets of indebtedness of Spiroplos Brothers, and that in the statement prepared by Soule was included the Miller ranch. That George Spiroplos and Milt Spiroplos both saw the statement and went over it with witness and Mr. Soule. That the statement included the Miller ranch with a valuation of \$3,000.00 and that in arriving at the amount of money that Mrs. Palantas was entitled to be paid in settlement of her deceased husband's estate which was a portion of the Spiroplos Brothers property, the Miller ranch was considered as an asset belonging to Spiroplos Brothers. That the inventory prepared at the request of George Spiroplos, the administrator of the estate, contained the Miller ranch.

On cross-examination this witness testified that at the time of the settlement the Miller ranch had not been mortgaged to the First National Bank. That neither the sheep belonging to John Demas nor any mortgage on them was considered as an asset of Spiroplos Brothers but that in the settlement it was agreed that Spiroplos Brothers owed John Demas the sum of \$5,000.00 on account of a wrongful credit of a deposit made by the bank.

Testimony of Chas. Bodeau, in His Own Behalf.

Mr. CHAS. BODEAU, the Trustee, as a witness on behalf of himself, was called and testified as follows:

That after his election as Trustee he went down to the Spiroplos Brothers ranch to make an in-

(Testimony of Chas. Bodeau.)

ventory of the [113] property owned by them. That he conferred with George Spiroplos. That subsequent to that time he had had some information about a mower that had not been put in the inventory. That he asked George if there wasn't a new mower on the place. When he made up his inventory he had found only two old mowers. That he asked George if there wasn't a third mower on the place and George replied to him, if there was he didn't know anything about it and he then asked George if there wasn't a new mower there and George said there was not. That the only gas engine that was pointed out was a one-horse-power engine and that no mention was made to him by George Spiroplos about a larger engine. Nothing was said to him about the posts. That he inventoried the shearing plant. That he didn't go clear up to the shearing sheds but he asked George if there was anything else up there and George said there was not. That George told him there was no gas engine belonging to the shearing plant. That there was no engine with it.

Testimony of William Pollman, for the Trustee.

Mr. WILLIAM POLLMAN was called as a witness on behalf of the trustee and testified that he was President of the First National Bank of Baker, Oregon, and of the Baker Loan & Trust Bank. That he had known George Spiroplos since about 1912. That he knew Milt Spiroplos. That most of the dealings had been with George Spiroplos. That he

(Testimony of William Pollman.)

also knew John Demas five or six years. That Spiroplos Brothers gave to the bank their first mortgage in 1918 and a second one in December, 1919. That the Miller ranch was included in the mortgage given to the bank in 1919. The mortgage was offered in evidence and marked as Trustee's Exhibit No. 13a. The witness also identified a statement covering assets of Spiroplos Brothers which [114] was introduced in evidence and marked as Trustee's Exhibit 14.

That the bank paid the taxes on the Miller land for the year 1920. That about the time the Miller land was purchased the matter was discussed with him by George Spiroplos. That George Spiroplos was going to buy the land in the name of John Demas so that John Demas could get a reserve right as an owner of lands. That Demas was running sheep at the time on which the bank had a mortgage. That an attempt was made to get on the reserve on the basis of the ownership of the lands but that the right was never allowed by the Government. That the land was not purchased by Demas. That George Spiroplos told him that he was buying the land and was buying the land for himself and that he deeded it to Demas simply to enable Demas to get forest reserve rights and that this conversation came up at the time that George Spiroplos borrowed the money to buy the land. That George Spiroplos had never prior to the time of the bankruptcy made any claim or any statement that this land belonged to John Demas.

(Testimony of William Pollman.)

Upon agreement of counsel the Special Master made a statement to the effect that on June 22, 1921, upon the motion of the attorney for the Trustee the Referee made an order directing the bankrupts to turn over to the Trustee all books of account and other memoranda touching the business heretofore conducted by the bankrupts either as individuals or as partners, a copy of the order being mailed on that date to Spiroplos Brothers at Home, Oregon.

Testimony of George Spiroplos, for the Bankrupts.

Mr. GEORGE SPIROPLOS was called as a witness and testified as follows:

That his name was George Spiroplos, 35 years old and resided in Baker County, Oregon. That he was a member of [115] the firm of Spiroplos Brothers and one of the individual bankrupts and that he had been doing business in Baker County since 1911. Was in livestock business consisting of mostly sheep. That he was connected in various transactions with John Demas and other parties in handling sheep. He was the head man. That the money which he had received from the sale of the cows which he claimed belonged to his children he had deposited in the bank to the credit of the children but that he had it in his name at this time, the amount being something like \$400.00 and that the money was still in the bank.

That John Demas had a bunch of sheep and had to have a home so he bought the Miller ranch, furnished the money and bought the ranch for him.

(Testimony of George Spiroplos.)

This was in 1918. That Spiroplos Brothers were well fixed at that time being worth over \$150,000.00. That just prior to that time he had bought a bunch of sheep for John Demas coming to something like \$16,000.00. The Miller ranch had about fifteen acres of cultivated land and raised about thirty or thirty-five tons of hay. That John Demas purchased a mowing-machine to use on the Miller ranch in 1918 just after he bought the place. That in the season of 1919 he left it on the Miller place, where it remained until the fall of the year 1920 when it was brought down to the Spiroplos Ranch at Home, Oregon. That he sold the mowing-machine to Dan Forsea for John Demas for the sum of \$50.00 which he deposited in the Weiser National Bank, the deposit slip introduced in evidence of April 11, 1921, containing an item of \$150.00 is the slip representing that deposit. That sometime later he gave Demas \$50.00 in cash. That he never tried to hide the mowing-machine and never moved it. That they had an old gas engine attached to the shearing plant which was sold [116] to Mrs. Bastian. That they then made an agreement with John Demas that they would furnish the shearing plant and he would furnish gasoline engine and they would shear their sheep together. That Demas furnished an engine. That he thought Mr. Demas ordered the engine in Baker, but that he thought it was shipped from the outside. He didn't know where from but that it was ordered through Baker. That the engine was shipped to Spiroplos

(Testimony of George Spiroplos.)

and charged to Spiroplos Brothers. That Demas ordered the engine himself and that he, George Spiroplos, did not order it. That George Spiroplos paid for it. That Spiroplos Brothers bought the smaller engine but that the larger engine was bought by John Demas, the smaller engine being returned by Spiroplos Brothers back to Nampa but that the last engine was ordered by John Demas through Baker but he didn't know where shipped from. That they paid \$2,800.00 for the Miller land, that is, \$2,200.00 and assumed the mortgage to the State Land Board for \$600.00. On page 151 he testifies that John Demas paid Spiroplos Brothers in full in 1919-1918, the fall of the year some time, didn't remember what month. Later he stated the date to be in 1919 and that after the settlement made in 1919 John Demas did not owe Spiroplos Brothers anything except for some small store bills. That the engine was sold to Gerald Stanfield for \$200.00 and that George Spiroplos got the money for the sale. He deposited the money in the bank to his own credit but claims that he turned over in cash this amount to John Demas some time later. The money being deposited in the Weiser National Bank. The engine being sold in March or April 1921. Trustee's Exhibit 4, a deposit slip representing a deposit of \$225.00, includes one of the payments made upon the gas engine. That he paid John Demas \$200.00 some time in June. [117]

On cross-examination he testifies that he thinks the settlement with John Demas was made after

(Testimony of George Spiroplos.)

the death of Nick Spiroplos, which occurred on November 9th, 1918, but that he wasn't sure, he thought it was about six or seven months afterwards. That the thing that brought about a settlement was the fact that the First National Bank had credited to Spiroplos Brothers a deposit of \$5,300.00, which should have been credited to John Demas. That the \$5,300.00 represented the sale of the 1919 lamb crop some time in June, May, June or July. His best recollection that it was in June. That at the time the settlement was made with the widow of the brother in closing up his brother's estate the item wrongfully credited by the bank was charged up as a liability against the estate. That the settlement with Demas was some time in the spring of 1919. That he was positive it was in 1919 in the spring after the wool was sold in May or June. That he was certain it came in those two months. That he thought the settlement took place at Home, Oregon. That when the settlement was concluded it was found that the books balanced. He didn't owe Demas and Demas didn't owe him. It just evened up in May 1919. Demas didn't pay him anything and he didn't pay Demas anything. That later the lambs were sold and the bank made the deposit above referred to and that accounted for the fact that this item was charged up against the estate. It should be recalled that he testified previously that the credit made by the bank was the thing that brought about the settlement. He denied that he bought the gas engine him-

(Testimony of George Spiroplos.)

self and that Virgil Daniels, the salesman for the Kleinschmidt Hardware Company, sold the engine to him. He admitted that Daniels had been down to his place and interviewed him trying to sell him the engine. That [118] he came to Baker himself and closed the transaction some time in April, 1919, and the engine when shipped was charged to the account of Spiroplos Brothers. That he did not tell the Kleinschmidt Hardware Company to charge the engine to his account because he wasn't there and that he didn't buy it. That he paid for it but he didn't buy it. That Virgil Daniels lied when he said that the witness came in and bought the engine and that witness was the only man that was ever talked to about the sale. Witness then testifies that Spiroplos Brothers ordered the first engine and they did buy the engine in the first place which was the engine turned back to the Kleinschmidt Hardware Company and that John Demas ordered the second engine which was shipped to Spiroplos Brothers and charged to Spiroplos Brothers and paid for by Spiroplos Brothers. That he was unable to produce anything to show that John Demas had ever made a settlement with Spiroplos Brothers in which this engine was paid for by him and that he had known about the hearing for a month. That he doesn't remember any of the items in the settlement that was made at any time or any amounts that were paid. He testifies the checks which had previously been introduced in evidence as the checks paid him

(Testimony of George Spiroplos.)

for the engine. They were offered in evidence at this time and were marked Trustee's Exhibit 19 and Trustee's Exhibit 20 and are as follows:

Trustee's Exhibit 19.

R. N. STANFIELD,

Stanfield, Ore.

Ontario, Oreg. Apr. 23, 1921.

Pay to the order of George Spiroplos, \$75.00
Seventy-five and no/100 Dollars.

G. E. STANFIELD,

By IVY M. LANDES. [119]

United States Nat'l.

Vale, Oregon.

Trustee's Exhibit 20.

Bal. in Full on Shearing Plant.

R. N. STANFIELD,

Dealer in Livestock,

Sheep a Specialty.

Chgs. equipment. No. 30892.

Weiser, Ida. 5/4, 1921. \$225.00.

Pay to the order of Geo. Spiroplos Two Hundred
twenty-five and no/100 Dollars.

Value received and charge to account of

K. W. KIVETT.

To R. N. Stanfield,

Weiser, Ida.

He claims to have paid Demas the \$200.00 some time in June, he didn't know at what place, at some sheep camp right after shearing and paid him in cash. That he took no receipt even though he knew that the gas engine transaction was being

(Testimony of George Spiroplos.)

investigated at the time. That he had testified before the referee on the 26th of May at which time the gas engine was a matter of inquiry but that he took no receipt from Demas for the payment of the \$200.00. On page 167 witness testifies that Spiroplos Brothers owned the Miller Ranch until some time in May 1919, holding it on account of money which John Demas owed but that they didn't remember seeing Trustee's Exhibit No. 14, the statement made to the bank which included the Miller Ranch as an asset but that it was his signature appearing on the statement. He *denies* that he ever made any statement to Mr. Pollman about the Miller Ranch or the reason that it was taken in the name of John Demas. He later admits on page 171 that he told Pollman he wanted to buy the land so that Demas could have a home and be able to put his sheep on reserve and that was why he was buying the land in Demas' name. That Demas paid the \$2,200.00 which had been advanced by Spiroplos Brothers in 1919 some time in May. This was in 1919. He admits that they gave a mortgage to the [120] First National Bank in which the Miller land was included. That the signatures on the mortgage are genuine.

That the mowing-machine was purchased by John Demas in 1918, some time in the spring, but that he did not know what month. That when he testified previously that the reason he didn't point out this mowing-machine to Charles Bodeau was because it was then on the Miller place and not on the Flick place, where Charles Bodeau was, and that

(Testimony of George Spiroplos.)

John Demas got the machine with the Miller place when he bought that place. That there was some mistake. That Demas did not buy it with the Miller place and that when he so testified previously he was mistaken. That there was no mower with the Miller place when he (George Spiroplos) bought it. That there was no old mower with the Miller place when Spiroplos bought it and that he made a mistake when he so testified. That he got mixed up between the McWaters place and the Miller place. That when they bought the McWaters place they got an old mower. That Demas had no interest in the McWaters place whatever. That there never was an old mower on the Miller place.

On redirect examination this witness testified that the reason the Miller land was included in the inventory was because it had not yet been paid for by Demas. That the inventory was prepared in the handwriting of Mr. James H. Nichols, one of the attorneys for administrator of the estate. That he explained to Mr. Nichols about the money that Demas owed on the place. That he didn't remember just how it was explained but that it was explained fully to Mr. Nichols and as a result the land was placed in the inventory. That he told the bank when he signed the mortgage that the Miller land did not belong to him and that John Demas owned it but in spite of that the bank [121] put it in the mortgage and he signed it. That his attorneys, Mr. Rand and Mr. Nichols, prepared the contract of settlement between him and Elene Palantatas, in both of which statements were made that

(Testimony of George Spiroplos.)

Spiroplos owned the Miller ranch. That in all of the transactions Mr. Rand and Mr. Nichols were acting as attorneys for the witness. On examination by the Special Master witness testified that at the time the mortgage was given to the First National Bank the bank knew that Demas did not owe anything to Spiroplos Brothers and that Spiroplos Brothers got all of the money that was borrowed at the time the mortgage was given and that all of the money went to Spiroplos Brothers.

At this time a recess was taken. After the recess was taken witness was placed on the stand and testified that the settlement which Spiroplos Brothers had with John Demas was in 1918, a short time after they had bought the Miller place and at that time the land was settled for and Demas paid Spiroplos Brothers for it and that he was mistaken when he previously testified that the settlement was in 1919.

On cross-examination he testified that all matters between him and John Demas were settled up at that time and from that time on John Demas financed himself except some supplies that he purchased and which he occasionally charged up to Spiroplos Brothers and that some time in 1918 he practically financed himself. That the settlement was made by witness' brother Nick who was living at the time and Nick made the settlement in the bank. That there was a check passed from Spiroplos to Demas or from Demas to Spiroplos

(Testimony of George Spiroplos.)

but witness did not remember which. That after the settlement made in 1918, Spiroplos Brothers had no interest in the land but that he put the land in the inventory of the Nick Spiroplos estate and gave a mortgage to the First National Bank. [122]

Testimony of John Demas, for the Bankrupts.

JOHN DEMAS was called as a witness on behalf of the bankrupts and testified that Spiroplos Brothers had the shearing plant and that he had sheep and he was shearing down on their place and that they made an agreement that Spiroplos Brothers should furnish the shearing plant and he would furnish the engine and he then had Spiroplos Brothers to order the engine and they ordered it and it came. That they bought it and paid for it in the first place and he then settled with them. That he did not order it himself but that Spiroplos ordered it and that he didn't know where they ordered it from or from where it came but that Spiroplos Brothers ordered it and he paid for it. That he had a settlement in 1918 and after that he didn't owe Spiroplos anything.

On cross-examination he testified that the settlement which he had with Spiroplos Brothers was in June or July 1918. That at the time of the settlement which took place at the First National Bank, at Baker, he was not present and that he never got together with Nick Spiroplos or George Spiroplos and went over the different accounts. That he

(Testimony of John Demas.)

was satisfied to take whatever figures Spiroplos Brothers had and accepted their settlement.

That he had nothing whatever to do with the negotiations for the purchase of the gas engine except that he told Spiroplos Brothers to buy the gas engine for him. That he didn't see any member of the sales force of the Kleinschmidt Hardware Company and that he did not himself buy the engine but that the entire transaction was handled by Spiroplos Brothers.

A. A. SMITH,

Attorney for Trustee and Appellant. [123]

State of Oregon,

County of Baker,—ss.

Service of a duly certified copy of the foregoing statement of evidence is admitted at Baker, Oregon, on this 27th day of March, 1923.

PACKWOOD and PACKWOOD,

Attorneys for Bankrupts.

Approved April 12, 1923.

R. S. BEAN,

Judge.

Lodged in Clerk's office, March 29, 1923. G. H. Marsh, Clerk. Filed April 12, 1923. G. H. Marsh, Clerk. [124]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 3 to 124, inclusive, constitute the transcript of record on appeal from the decree of the District Court of the United States for the District of Oregon, in a cause in said court in bankruptcy, in which George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos, partners under the firm name of George S. Spiroplos & Bros., were adjudged bankrupts and in which cause Charles Bodeau, Trustee in Bankruptcy of the estate of said bankrupts is appellant, and said George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos are appellees. That said transcript of record has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and is a full, true and correct transcript of the record and proceedings had in said court in said cause, which the said praecipe designated to be included therein, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of said transcript of record is Thirty-six 35/100 dollars and that the same has been paid by said appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 9th day of June, A. D. 1923.

[Seal]

G. H. MARSH,

Clerk. [125]

[Endorsed]: No. 4050. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos, Partners Under the Firm Name of George S. Spiroplos & Bros., Bankrupts. Charles Bodeau, as Trustee in Bankruptcy of the Estate of George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos, Appellant, vs. George S. Spiroplos, Miltiades Spiroplos and Gust Spiroplos, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed July 2, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the
District of Oregon.

June 12, 1923.

In the Matter of GEORGE S. SPIROPLOS et al.,
Bankrupts.

**Order Extending Time to and Including June 20,
1923, to File Record and Docket Cause.**

Now, at this day, for good cause shown, IT IS
ORDERED that the time for filing the transcript
of record in this cause and docketing the same in
the United States Circuit Court of Appeals for the
Ninth Circuit be, and the same is hereby, extended
to and including June 20, 1923.

R. S. BEAN,
Judge.

[Endorsed]: Docketed. No. 4050. United
States Circuit Court of Appeals for the Ninth
Circuit. Order Under Subdivision 1 of Rule 16
Enlarging Time to and Including —, 192—, to
File Record and Docket Cause. Filed Jul. 2, 1923.
F. D. Monckton, Clerk.

No. 4050.

**United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT**

In the Matter of GEORGE S. SPIROPLOS,
MULTIADES SPIROPLOS and GUST SPIR-
OPLOS, partners under the firm name of
George Spiroplos and Brothers,

Bankrupts,

CHAS. BODEAU, as Trustee in Bank-
ruptcy of the estate of George S. Spiroplos,
Miltiades Spiroplos and Gust Spiroplos,

Appellants,

vs.

GEORGE S. SPIROPLOS, MULTIADES
SPIROPLOS and GUST SPIROPLOS,

Appellees.

Upon appeal from the United States Circuit Court for the
District of Oregon.

APPELLANTS' BRIEF.

PACKWOOD & PACKWOOD, of Baker, Oregon,
Attorneys for Appellees.

A. A. SMITH, of Baker, Oregon,
Attorney for Appellant.



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No. 4050.

**United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT**

In the Matter of GEORGE S. SPIROPLOS,
MULTIADES SPIROPLOS and GUST SPIR-
OPLOS, partners under the firm name of
George Spiroplos and Brothers,

Bankrupts,

CHAS. BODEAU, as Trustee in Bank-
ruptcy of the estate of George S. Spiroplos,
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Appellants,

vs.

GEORGE S. SPIROPLOS, MULTIADES
SPIROPLOS and GUST SPIROPLOS,

Appellees.

Upon appeal from the United States Circuit Court for the
District of Oregon.

APPELLANTS' BRIEF.

PACKWOOD & PACKWOOD, of Baker, Oregon,
Attorneys for Appellees.
A. A. SMITH, of Baker, Oregon,
Attorney for Appellant.

STATEMENT OF CASE.

On the 30th day of October, 1920, appellees filed in the district Court of the United States for the District of Oregon, their petition to be adjudged bankrupts both as a partnership and individually. An order was made on that date duly adjudging them as bankrupts and under the customary routine the entire matter was referred to the referee at Baker, Oregon. At a meeting of the creditors called by him the appellant was elected as Trustee and proceeded to take charge of the property. Two hearings were held for the purpose of discovering assets at both of which George S. Spiroplos, one of the appellees appeared and testified. The testimony taken at both of these hearings by stipulation was included as a part of the testimony taken upon objections to discharge.

Subsequently and in due time the appellees filed their petitions for discharge. A meeting of the creditors was then called and at this meeting the appellant was directed by the creditors to appear and file objections to the discharge and take such proceedings as were necessary to properly present the same to the Court. Acting in accordance with the authority thus given the appellant filed objections to the discharge of the bankrupts. These objections, specifications of which were filed and served as required by law were based principally upon two propositions.

(1) Concealment of assets.

(2) False statements on account of failure to include assets concealed in schedules.

The concealment of the assets related to several items of property which were covered by different specifications. The property concealed consisted of the following.

- (1) Miller land.
- (2) Gas engine.
- (3) Mowing machine.
- (4) Eight head of cattle.
- (5) Twelve hundred posts.
- (6) Account against Mrs. Bastian.

The specification as to the oath or false swearing consisted in taking oath that all property owned by bankrupts was set forth in schedules without including that mentioned above.

The specifications were in due course referred by the Court to a Special Master for hearing and report. Testimony was taken by the Special Master and after consideration he made Findings of Fact supporting the specifications as to the concealment of all the property except the account against Mrs. Bastian which he overruled and sustained the specification in connection with the false swearing and made elaborate Findings of Fact and recommended to the Court that the discharge be denied. The testimony was all taken before the Special Master except the depositions in connection

with deposits made by the bankrupts since bankruptcy and the sale of the gas engine, none of which facts are disputed by the bankrupts. He had an opportunity to see the witnesses upon the stand, observe their demeanor and determine the credibility that should be given to their testimony.

Appellees filed objections to the Findings made by the Special Master sustaining the specifications referred to which objections were heard by the Court and after a hearing the Court overruled the objections to the discharge and granted each of the appellees a discharge from his debts.

The Court made no new Findings of Fact but simply entered an order overruling the objections.

Appellant filed a petition for a rehearing which was denied and then appealed to this Court.

ASSIGNMENTS OF ERROR

Appellant relies upon the errors of the Court alleged in the Assignment of Errors found on pages 55 to 58 inclusive of the Transcript, which for the sake of convenience we in effect set forth again.

I.

That the Court erred in granting to the bankrupts a discharge for the reason that the Bankrupts willfully concealed property consisting of a gas engine, mowing machine, eight head of cattle, twelve hundred posts and their ownership of the Miller land consisting of one hundred and sixty acres.

II.

That the Court erred in granting the bankrupts a discharge for the reason that the bankrupts willfully and knowingly failed and neglected to include in the schedules filed the property mentioned in the preceding paragraph.

III.

That the Court erred in granting a discharge to the bankrupts for the reason that the bankrupts committed perjury in connection with the oath taken as to property owned by bankrupts.

IV.

That the Court erred in granting a discharge to the bankrupts for the reason that they willfully failed to produce their books of account showing transactions between themselves and one John Demas.

V.

That the Court erred in granting a discharge to the bankrupts because of the fact that Miltiades Spiroplos less than four months prior to the time of the filing of the petition, transferred an automobile owned by him to one John Demas in payment of a pre-existing debt and the said automobile was not included in the assets listed in the schedules.

VI.

That the Court erred in granting a discharge for the reason that the bankrupts and one John

Demas conspired together for the purpose of concealing assets.

POINTS AND AUTHORITIES IN CONNECTION WITH ASSIGNMENTS OF ERROR.

I.

Findings of Fact made by the Master in Chancery have all the presumptions in their favor and should not be set aside unless error clearly appears. The only question is, are the Findings supported and they should not be overruled unless manifestly wrong.

Simpkon's Federal Equity Suit, 3rd
Ed. 574.

Montgomery's Manual of Federal Procedure, 2nd Ed. 447.

Brandenburg on Bankruptcy 4th Ed.
1069.

3 Remington on Bankruptcy, 2nd Ed.
2424.

In Re Conroy, 134 Fed. 764.

II.

The Findings of the Court upon a question of fact are presumptively correct and should be sustained unless some specific error of law or serious mistake of fact intervene in the conclusion of the

case. The fact that the Referee who saw and heard the witnesses and who enjoyed the best opportunity to judge of their credibility comes to a different conclusion, detracts much from the strength of this presumption.

Coder -vs- McPherson, 752 Fed. 951.

III.

In cases where there is a difference between Findings made by a Master or Referee and those made by the District Judge and where the determination depends upon the credibility of the witnesses it is the duty of the Court to accept the Findings of that branch before whom the witnesses personally appeared and who on that account had superior opportunity to determine their credibility.

In Re Wheeler 165 Fed. 188.

IV.

Where the Master is of the opinion that no reliance whatever can be given to the testimony of the bankrupts or his witnesses and there is credible evidence to sustain the specifications, the Findings of the Special Master should not be disturbed.

In Re Knaszak 151 Fed. 503.

In Re Wheeler, 165 Fed. 188.

In Re Harr, 143 Fed. 421.

V.

Concealment may be perpetrated amongst other ways by purposely omitting assets from the schedules in bankruptcy.

3 Remington on Bankruptcy 2nd Ed. 2340.

In Re Skinner 97 Fed. 190.

VI.

Concealment may be perpetrated by purposely failing to schedule property held on secret or resulting trust for the debtors benefit where the legal title to it has never been in the bankrupt.

3 Remington on Bankruptcy 2nd Ed. 2344.

Hudson -vs- Mercantile National Bank 119 Fed. 346.

ARGUMENT

The assignments will be discussed by us in our brief as one proposition, all having to do with the concealment of assets even the one relating to the perjury committed. In fact the gist of the whole matter concerns the charge of concealment of assets and the assignments while directed to different aspects of that general charge yet as a matter of fact are so closely inter-related that a discussion of this general proposition affects the substance of the whole matter of objections to discharge. The entire matter can be presented more clearly and succinctly by discussing all of the assignments as one general proposition of the concealment of assets.

hence our brief will be a discussion of the general proposition of the concealment of assets by the bankrupts.

At the outset it is well to remember that this case rests as a matter of fact upon the Findings made by the Special Master who in this case happens also to be the Referee in Bankruptcy. The Court when objections were made to the Findings contented itself with a review of the conclusions arrived at by the Special Master but as a matter of fact did not disturb the Findings made by the Special Master so that the Findings of the Special Master if supported by any testimony are conclusive in this Court and the only question for discussion is whether or not those Findings are supported by any testimony and justify withholding a discharge.

The fact that the Court made no new Findings of Fact is in effect an approval of the Findings of Fact made by the Special Master. Under these circumstances the only question before this Court is whether or not the Findings are supported by any testimony. The weight of the testimony is not for consideration at all.

In Simpkon's Federal Equity Suit, 3rd Ed. 574, the rule is stated as follows:

“The rule is that the Findings of Fact by the Master have all the presumptions in their favor and should

not be set aside unless error clearly appears.

* * * *

“The only question is, are the Findings supported * * * and should not be overruled unless manifestly wrong.”

In Montgomery's Manual of Federal Procedure, 2nd, Ed. 447, the rule is stated as follows:

“The Conclusions of a Master on matters of fact have every presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part.”

In Brandenburg on Bankruptcy 4th Ed. 1069, testimony. the weight of the testimony is not for

“The Referee's or Special Master's determination upon the sufficiency of the evidence to support specifications of objections is entitled to weight and will not be set aside unless it be clearly erroneous.”

In 3 Remington on Bankruptcy, 2nd Ed. 2424, the rule is stated as follows:

“The Findings of Fact by the Special Master will not be reversed except upon clear and convincing

proof of error. He has view of the witnesses and may note their demeanor on the stand.”

In *Re Conroy* 134 Fed. 764, the Court made this statement.

“He, (Special Master) had the witnesses before him and is therefore better able to judge what weight should be given to their utterances than the Court, who must depend upon the written statement.”

While the general rule is that the judgment of the lower Court in cases of this kind will not be disturbed unless clearly against the weight of the evidence or unless plain and manifest error exists, this rule is not followed where findings of the Special Master and the District Judge differ. In this case however, the District Judge has in effect approved the Findings made by the Special Master, and the same are therefore less open to question than if there were different Findings made by each Judicial officer. If the position be taken that the Courts order granting the discharge was in effect overruling the Findings made by the Special Master the District Judges' conclusion would be of little binding force upon this Court. This Court would take the same attitude as though it were passing in the first instance upon the report of the Special Master entirely uninfluenced by the order made by the District Judge.

In Coder -vs- McPherson 752 Fed. 951, the Court speaks as follows:

“The Finding of the Court upon this question of fact is presumptively correct and it should be sustained unless some obvious error of law or serious mistake of fact intervene in the conclusion of the case. The fact that the referee who saw and heard the witnesses and who enjoyed the best opportunity to Judge of the credibility of their testimony came to a different conclusion detracts much however, from the strength of this presumption.”

In cases such as the one at bar where the question of concealment depends upon the credibility of the witnesses then the rule is much stronger, disfavoring the disturbing of the Findings made by the Referee or Special Master.

The Court in the case of In Re Wheeler, 165 Fed. 188, says:

“In cases of this kind where there is nothing in the evidence pointing one way or the other we think it our duty to accept the findings of the branch of the Court before whom the witness personally appeared and who on that account had superior opportunity to

determine her credibility. In this case that branch of the Court is the referee who under the bankruptcy act * * is given power in the first instance to find the facts and all things considered we think it was error in the District Court not to accept that Finding."

In this case the Referee after hearing the testimony made certain Findings of Fact which we desire to call attention to at this time. They are found on pages 34 to 42 inclusive of the Transcript.

Finding No. 1 overrules the specifications 1 and 2.

Finding No. 2, refers to the eight head of cattle. In that Finding the Court in referring to the credibility of George Spiroplos, one of the appellees says: (pg. 36)

"And the testimony of George Spiroplos * * is so contradictory that it is entitled to no credit whatever; and the testimony of John Demas * * is so indefinite and uncertain as to be of no value whatever and the Special Master therefore finds that the bankrupts herein have knowingly omitted these cattle from the list of their property and assets as set forth in their schedules and that said cattle were at

the time of the filing of said schedules the property of either the bankrupts as co-partners or of George Spiroplos, individually.”

The Special Master’s Finding No. 3, has to do with the mowing machine with respect to which the Special Master says: (pg. 36)

“The testimony of George Spiroplos * * is so contradictory that it is impossible to reconcile the same so as to give it any credit or consideration whatever; and the testimony of John Demas * * is so contradictory that it is impossible to reconcile the same as to give it any credit or consideration whatever, while the testimony of Mr. Frosea * * and that of Mr. Dugger * * and that of Mr. Smith * * clearly indicates that this mower was purchased by George Spiroplos, on behalf of the partnership now in bankruptcy * * and the Special Master therefore finds that this McCormick mower was owned by the partnership now in bankruptcy at the time of the making and filing of the schedules herein and was knowingly omitted from said schedules by the bankrupts.”

Finding No. 4, of the Special Master refers to the gasoline engine and in respect thereto the Special Master says: (pg. 38)

“The testimony of George Spiroplos * * cannot be reconciled sufficiently to deserve any credit or consideration and that the same is true of the testimony of John Demas * * while the testimony of Mrs. McBirney * * and of Mr. Daniels * * , Trustees Exhibits 2, 3, 4, and 5, show conclusively that this engine was purchased by George Spiroplos for the partnership now in bankruptcy prior to the adjudication of bankruptcy * * and the Special Master therefore finds that this gasoline engine was the property of the partnership now in bankruptcy at the time the schedules herein were made and filed and that the same was knowingly omitted from said schedules by these bankrupts.”

Finding No. 5, refers to the Miller land and the Special Master in referring to that matter says: (pg. 39)

“The testimony of George Spiroplos * * and the testimony of Mr. Soule * * and also the testimony of Mr. Smith * * and also the testimony of William Pollman and also Trustee's

Exhibit 8, 9, 11, 12, 13, 13a, 14, 15, 16, 17, 18, all indicate to the entire satisfaction of the Special Master that this land was purchased by George Spiroplos, one of the bankrupts herein either for himself or for the partnership in bankruptcy herein long prior to the adjudication of bankruptcy herein * * and that the same was paid for by the partnership in bankruptcy herein * * and that said lands are still owned by the partnership in bankruptcy herein or by George Spiroplos one of the bankrupts herein * * and the Special Master therefore finds that said lands were owned by the partnership in bankruptcy herein or by George Spiroplos one of the bankrupts herein but that the same was knowingly omitted by the bankrupts herein in their said schedules."

Schedule No. 6, (pg. 40) refers to the failure of the bankrupts to produce a book of accounts in which Mr. Soule, who had been employed as an accountant by the bankrupts had stated the account between the bankrupts and John Demas had been kept.

Finding No. 7, (pg. 41) refers to the transfer to John Demas of an automobile belonging to one of the bankrupts and giving him a preference and not including the automobile in the assets.

Finding No. 8, (pg. 41) is to the effect that the bankrupts knowingly failed to include 1200 posts in their schedules.

In Finding No. 10, (pg. 42) the Special Master makes this statement.

“That the bankrupt herein and the said John Demas hereinbefore mentioned have so conducted and arranged matters in their dealings and business connections with each other as to make it impossible to ascertain many facts relative to the matters now under consideration and have undertaken to state the facts relative to several of their business transactions but that in their statements from time to time as shown by the record herein all of which have been made under oath they have contradicted themselves so frequently and in such a manner as to convince the Special Master that they have contrived and conspired together for the purpose of concealing properties belonging to the bankrupts and attempting to make it appear that said properties belonged to said John Demas.”

The Special Master then finds as his conclusion (pg. 42) that the bankrupts knowingly and willfully concealed and withheld the property referred to.

It is apparent from the Findings referred to that the Special Master was entirely convinced by the testimony produced that the eight head of cattle, the mowing machine, the gas engine, the posts and the Miller land were at the time of the filing of the schedules the property of the bankrupts. None of this property was scheduled by the bankrupts and none of it was included in their assets. The record amply supports the conclusions reached by the Referee.

We shall not discuss the record in connection with all of the matters upon which Findings have been made. If there was a willful concealment of assets by the bankrupts of any item of property upon which a finding has been made by the Special Master and that finding is supported by the testimony produced it is just as effective to bar a discharge as the concealment of a large number of items of property and while the testimony amply supports all of the Findings made by the Referee we shall discuss at length two of the items of property, the gas engine and the Miller land.

GAS ENGINE

The Court will remember that the Special Master made a finding that at the time of the filing of the schedules the bankrupt partnership owned the gas engine referred to and that it was not included in the schedules. That it was not included is not disputed. Now let us examine the testimony and see what the record shows relative to this gas engine.

On page 92 of the transcript is found the testimony of Mr. V. E. Daniels. Mr. Daniels testified that in April 1919 he was a salesman for the Eastern Oregon Hardware Company which had formerly been known as the Kleinschmidt Hardware Company. That he talked to George Spiroplos prior to the 7th day of April of that year relative to the sale of a gas engine. That the matter was not discussed by him with anyone else. That he went to the ranch of Spiroplos Brothers in connection with the same matter and that an Alamo engine was later sold to George Spiroplos, for the partnership, the engine being shipped from Caldwell, Idaho. The first engine was not found satisfactory and was exchanged for a larger one. The Eastern Oregon Hardware Company subsequently dissolved and he tried to find the original sales slip but could not locate it.

Mrs. McBirney a witness whose testimony is found on page 87 of the transcript testified that in 1919 she was bookkeeper for the Eastern Oregon Hardware Company and explained the method of bookkeeping of that Company. There was then presented to Mrs. McBirney a carbon copy of the monthly record of sales to Spiroplos Brothers covering the month of April 1919, the original of which she testified was mailed to Spiroplos Brothers on May 1st. of that year. This was introduced in evidence as Trustee's Exhibit 2 and is found on page 88 of the Transcript of Record. Under date of April 7, is found a debit charge of

\$270.20 for one 6 horse power Alamo engine, and under date of April 21, is found a charge of \$453.00 for a 9 horse power Alamo engine. In addition there were freight charges in connection with both items. The total amount of sales for the month of April to Spiroplos Brothers is shown by this Exhibit to have been \$1166.39. The customers ledger of the Kleinschmidt Hardware Company, subsequently the Eastern Oregon Hardware Company was then produced and pages 31 and 32 under the letters "Si" were identified by the witness as being the account of Spiroplos Brothers, the bankrupts. These two pages were introduced in evidence and were marked as Trustee's Exhibit 3, and are copied into the Transcript on page 91. These pages show the transfer on the 30th day of April to that book of the item of \$1166.39 and showing a credit under date of April 21st. from the journal of \$278.45 which was identified as the credit given for the return of the smaller engine. Mrs. McBirney testifies that the item of \$272.20 was a gas engine sold to the bankrupts, and the item of \$453.00 was also a gas engine sold to the bankrupts. This account also shows a credit under date of July 8, of \$1058.23. This represented the payment of cash in that sum on that date. Witness identified at that time a check given by George Spiroplos in that sum of money on that date as the check which paid that account in full. This check was introduced as Trustees Exhibit 4, and is copied into the Transcript at page 92.

This testimony by absolutely disinterested witnesses shows the sale of a gas engine by the Kleinschmidt Hardware Company to Spiroplos Brothers and the payment for the same by George Spiroplos one of the bankrupts. The sale of the gas engine to Spiroplos Brothers is conclusively established by this testimony. Bankrupts admit the sale of this engine subsequent to the bankruptcy but deny their ownership claiming it never was the property of the bankrupts. (See testimony George Spiroplos pages 106-109-144-146. Transcript of Record.)

The sale of the engine and the ownership being established as above indicated any explanation or contradiction of the facts and circumstances as outlined would necessarily have to come from the bankrupts themselves. This would necessarily involve the credibility of the witnesses, a matter upon which the Special Master is most fitted to pass. For the purpose of showing that the Special Master was entirely correct in his Finding that the gas engine belonged to the bankrupts and that George Spiroplos and John Demas the witnesses testifying in connection with the purchase of this engine we desire to particularly call the Courts attention to the testimony given by these witnesses respecting that transaction.

George Spiroplos first appeared as a witness on the 26th of May 1921. Relative to the gas engine he testified in the following manner. (pg. 106 Transcript)

That John Demas got the engine from Kleinschmidt, he and Chris Coleman buying it. That George Spiroplos furnished the plant and everything and Coleman and Demas furnished the engine and they all sheared together. **That he did not know when the engine was purchased from Kleinschmidt, sometime like two or three years. That the engine was taken down to the Flick place when it was first purchased and that was the first time he knew anything about it.** That he did not remember the year. That the engine had since been sold to Stanfield by John Demas not very long before the testimony was taken, perhaps a month. **That he did not know how much Demas got for it but that he thought a couple hundred dollars.**

Spiropolos was next called as a witness on June 7, 1921. At this time he testified relative to the gas engine as follows: (pg. 109, Transcript)

That the gasoline engine was bought after Spiroplos Brothers had bought the place from John Flick. That they had an old engine from the Flick place but that it was too big for the shearing plant and that Spiroplos Brothers furnished the shearing plant, Chris Coleman and John Demas bought the gasoline engine and they didn't charge each other anything for the use of the plant. **That he (witness) sold the engine to Gerald Stanfield for \$200.00.** That he paid the \$200.00 to John Demas.

Spiroplos was next called as a witness on October 24th, 1921 at which time he testified relative to the gas engine as follows: (pg. 144 Transcript)

That they then made an agreement with John Demas that they would furnish the shearing plant and he would furnish a gasoline engine and they would shear their sheep together. That Demas furnished an engine. That he thought Mr. Demas ordered the engine in Baker but that he thought it was shipped from the outside. He didn't know where from but that it was ordered through Baker. That the engine was shipped to Spiroplos and charged to Spiroplos Brothers. That Demas ordered the engine himself and that he George Spiroplos did not order it. That George Spiroplos paid for it. That Spiroplos Brothers bought the smaller engine but that the larger engine was bought by John Demas, the smaller engine being returned by Spiroplos Brothers back to Nampa, but that the last engine was ordered by John Demas through Baker but he didn't know where shipped from. That the engine was sold to Gerald Stanfield for \$200.00 and that George Spiroplos got the money for the sale. He deposited the money in the Bank to his own credit. On cross examination page 146, he denied that he bought the gas engine himself and that Virgil Daniels the salesman for the Kleinschmidt Hardware Company sold the engine to him. He admitted that Daniels had been down to his place and interviewed him trying to sell him the engine. That he came to Baker himself and closed the transaction sometime in April, 1919, and the engine when shipped was charged to the account of Spiroplos Brothers. That he did not tell the Kleinschmidt

Hardware Company to charge the engine to his account because he wasn't there and he didn't buy it. That he paid for it but he didn't buy it. That Virgil Daniels lied when he said that the witness came in and bought the engine and that witness was the only man that was ever talked to about the sale. Witness then testifies that **Spiroplos Brothers** ordered the first engine and they did buy the first engine in the first place which was the engine turned back to the **Kleinschmidt Hardware Company** and that **John Demas** ordered the second engine which was shipped to **Spiroplos Brothers** and charged to **Spiroplos Brothers** and paid for by **Spiroplos Brothers**. That he was unable to produce anything to show that **John Demas** had ever made a settlement with **Spiroplos Brothers** in which this engine was paid for by him and that he had known about the hearing for a month. That he doesn't remember any of the items in the settlement that was made at anytime or any amounts that were paid. He identifies the checks which had already been given him by **Stanfield** in payment for the engine. These checks are set out in full in page 148 of the Transcript.

He claims to have paid **Demas** the \$200.00 for the engine sometime in June, he didn't know at what place, at some sheep camp right after shearing and paid him in cash. That he took no receipt even though he knew that the gas engine transaction was being investigated at the time. That he had testified before the referee on the 26th of May

at which time the gas engine was a matter of inquiry but that he took no receipt from Demas for the payment of the \$200.00.

Now if anyone can determine from the testimony of this witness exactly what took place he must be possessed with the power of divination. At the outset Spiroplos says that he didn't know where the engine came from. That it was purchased by Demas and Coleman and paid for by them and that his firm had absolutely nothing to do with it. When the testimony of Daniels supported by the records of the Eastern Oregon Hardware Company are introduced and show beyond cavil or dispute that the engine was purchased by Spiroplos Brothers we then have Spiroplos changing his testimony saying that he ordered the engine, made the deal himself and paid for it but that at some uncertain moment during the business career of himself and John Demas that John Demas reimbursed him for the money. Not a transaction or a scratch of a pen in support of any such claim. We have in addition to that the testimony of Spiroplos at the beginning of the hearing that Demas sold the engine to Stanfield for an amount of money unknown to the witness. We then have his testimony that he sold the engine himself, received the money for it, deposited it to his own credit and then at a sheep camp without recollection as to the location or as to time that the money was turned over to Demas in cash. And this it must be remembered was done at a time when this very transaction was being scrutinized by the

Trustee and by the parties interested in this case. If the question of the weight of the testimony was properly before this Court what we have pointed out would show beyond any question that the Special Master was correct in the Findings which he made.

Let us examine the testimony of Demas, a witness for the bankrupts in connection with this same matter. Mr. Demas testifies in connection with this matter in the following manner, (pg. 124), testimony taken June 7, 1921.

That he had been connected with Spiroplos Brothers for the years 1916 to 1918 at which time he paid all his debts and after that time he took care of himself and that after 1918 he financed his own operations. That he and Chris Coleman bought the gasoline engine, George Spiroplos owning the shearing plant. That George promised to furnish the shearing plant and he and Chris Coleman furnish the gas engine and that he bought the gas engine in 1919 from Kleinschmidt Hardware Company paying \$300.00, **using his own money to pay for it.** That he told George Spiroplos to sell the gas engine for him about the 1st of May, 1921. (pg. 125). That he bought the gas engine in 1919 sometime in the early part of April. **That he paid cash for his share and Chris Coleman paid for his share by check.** That he and Chris Coleman bought it together and he paid cash and Chris Coleman paid check and that afterwards Chris Coleman turned

his interest over to him (Demas) and had no more interest in it.

On October 24th, 1921, Demas was again called as a witness for the bankrupts and testified as follows: (pg. 152).

That Spiroplos Brothers had the shearing plant and that he had sheep and he was shearing down on their place and they made an agreement that Spiroplos Brothers should furnish the shearing plant and he would furnish the engine and he then had Spiroplos Brothers to order the engine and they ordered it and it came. That they bought it and paid for it in the first place and he then settled with them. That he did not order it himself but that Spiroplos ordered it and that he didn't know where they ordered it from or from where it came but that Spiroplos Brothers ordered it and he paid for it. That he had a settlement in 1918 and after that he didn't owe Spiroplos anything. (pg. 153). That he had nothing whatever to do with the negotiations for the purchase of the gas engine except that he told Spiroplos Brothers to buy the gas engine for him. That he didn't see any member of the sales force of the Kleinschmidt Hardware Company and that he did not himself buy the engine but that the entire transaction was handled by Spiroplos Brothers.

This witness when questioned first about the transaction testifies that he and Chris Coleman bought the engine for cash and paid for it which agreed with the early testimony of Spiroplos. When

Daniels testimony is taken and the records of the Hardware Company are introduced this witness says that he had absolutely nothing to do with the purchase of the engine but that it was bought by Spiroplos at his request and that Spiroplos paid for it and he afterwards reimbursed Spiroplos for what had been paid.

Now these witnesses, Spiroplos and Demas, could not have been telling the truth in all of the testimony which was submitted by them relative to this gas engine transaction. A portion of this testimony is absolutely incorrect and nothing more is needed than the testimony of themselves to show that fact. That it is willfully false is indicated by the fact that prior to the introduction of the records of the Hardware Company from whom the engine was purchased and the testimony of Daniels, both testified the engine was purchased by Demas and paid for by him. That would clearly establish that Spiroplos Brothers at the time of the bankruptcy had no interest in the property. It became necessary to change the testimony on account of the records of that Company, backed by the check given by Spiroplos in payment of the account which included the engine. We have no hesitancy in saying that that the testimony of the purchase of the engine by Demas and Coleman, by both of these witnesses is deliberately false. It cannot be said to be due to any honest mistake.

With this situation the Master was certainly warranted in making the Findings which he did.

As we stated before the testimony in contradiction of the effect of the testimony given by Daniels and by Mrs. McBirney supported by the records of the Eastern Oregon Hardware Company must of necessity come from the bankrupts themselves and the weight of such contradictory or explanatory testimony depends in this case wholly upon the credibility of the witnesses, contradicting or explaining. The Special Master has specifically found that the bankrupt George Spiroplos has contradicted himself in his testimony in such vital matters and so frequently that his testimony is entitled to no weight whatever and has made the same Findings in respect to the witness Demas. The Special Master saw these witnesses upon the stand, noted their demeanor and the manner in which they testified and after a consideration of the entire record came to the conclusion that neither the bankrupt George Spiroplos nor the witness John Demas were worthy of belief. Unless the Special Master was so clearly erroneous in his conclusion as to the ownership of the gas engine his Findings in respect to that matter cannot at this time be disputed.

In *Re Knaszak* 151 Fed. 503, the Court in referring to a similar matter said:

“They (Findings of Fact) are based on conflicting testimony and in their ascertainment much depended upon the credibility of the bankrupt. The Master was of the opinion that no reliance whatever could be given to such

of the bankrupts testimony as was before him. In these circumstances and the record containing other credible evidence to sustain the specifications the Findings of the Special Master should not be disturbed."

Again in the case of *In Re Wheeler*, 165 Fed. 188:

"In cases of this kind where there is nothing in the evidence pointing one way or the other we think it our duty to accept the Findings of the branch of the Court before whom the witness personally appeared and who on that account had superior opportunity to determine her credibility. In this case that branch of the Court is the referee who under the bankruptcy act * * is given power in the first instance to find the facts and all things considered we think it was error in the District Court not to accept that finding."

Again in the case of *In Re Harr* 143 Fed. 421, the Court said:

"The Findings of Fact by a Special Master who attended the examination of the witnesses thus giving him an opportunity of seeing them testify * * are very persuasive and if there is substantial testimony to sustain the find-

ing uninfluenced by any mistaken conclusions of law they will not be disturbed by the Court hearing the cause on a transcript of the evidence without opportunity to see the witnesses and thus to judge of their credibility in the same manner as was enjoyed by the Master. For these reasons the Findings * * will not be disturbed although the testimony is conflicting and but for the findings of the special master the Court might have reached this conclusion."

The force of any dispute therefore of this positive testimony showing the sale in the manner in which it is shown must depend upon the credibility of the witness making the dispute and the Special Master having found that the witness disputing the propositions were not worthy of belief, the finding made by the Special Master must absolutely stand.

THE MILLER LAND

The first testimony in point of time concerning the Miller land transaction is that of William Pollman, (pg. 141) who testified that he was President of the First National Bank of Baker and of the Baker Loan & Trust Company. He had known George Spiroplos since 1912 and also knew Milt Spiroplos but that George Spiroplos had carried on

most of the business for the partnership. That at the time the Miller land was purchased George Spiroplos discussed the matter with him intending to buy the land and take it in the name of John Demas and in that manner enable John Demas to get on the forest reserve. That George Spiroplos told the witness that he was buying the land and was buying it for himself. That Demas did not own it and that the title was taken in the name of Demas simply to enable Demas to get on the reserve and that up to the time of the bankruptcy there had never been a claim made by George Spiroplos or by anyone else that the land belonged to John Demas.

He further testified that Spiroplos Brothers, including George Spiroplos, gave to the First National Bank, a mortgage in 1918 and another in 1919. In the last mortgage the Miller land was included. The next is Trustee's Exhibit No. 14, which is a statement made to the First National Bank on November 27, 1918 for the purpose of obtaining credit. This Exhibit is found on page 62 of the Transcript and contains this item.

“Miller Place near Home, Oregon,
stands in name of John Demas,
..... \$2700.00”

This statement is signed by George Spiroplos.

The next matter concerning this land is the inventory in the estate of Nicholas Spiroplos, of which George Spiroplos, one of the bankrupts was administrator. Nick Spiroplos was prior to his

death a member of the partnership of Spiroplos Brothers. This inventory is a part of Trustee's Exhibit 16, contains the following item. (pg. 112)

“Also an undivided one-fifth interest in what is known as the Miller land now standing in the name of John Demas and described as follows:

* * * * * \$200.00”

This inventory is sworn to by George Spiroplos, one of the bankrupts. Subsequently George Spiropolos makes a semi-annual report in which a statement of the property coming into his hands as administrator is made and this statement contains among other assets the Miller land exactly as stated in the inventory. This is a portion of plaintiff's Exhibit 13, found on page 113 of the Transcript and is likewise verified by George Spiroplos. This land next enters into a contract between George Spiroplos as administrator and the widow of Nick Spiroplos, the same being a contract of settlement. This contract appears as Trustee's Exhibit 12, and found on page 119 of the Transcript. This Exhibit contains the names of the partnership existing at the time including all three of the bankrupts and provides that upon the payment of the sum of money fixed thereon the widow shall deed all of her interest in the real estate owned by the partnership.

“Consisting of what is known as the * * Miller Ranch.”

This contract is signed by George Spiroplos

personally and as administrator and on behalf of the other parties.

At this same time a mortgage is given to the First National Bank. This mortgage was introduced in evidence, marked as Exhibit 13a and is found on page 120 of the Transcript. The mortgage describes the Miller land by legal subdivisions except a mistake of one forty and covenants that the three bankrupts are the owners in fee simple of the property described in the mortgage which includes the Miller land and warrants the title against all legal claims.

There was also introduced in evidence as found on page 122 receipts issued by the State Treasurer showing the payment of interest upon a mortgage held by the State upon this land the same showing the payment of interest by George Spiroplos.

On page 114 of the transcript is found excerpts from the final report filed by George Spiroplos as administrator of the Nick Spiroplos estate. This is a portion of Trustee's Exhibit No. 18. In this report the administrator recites the details of the settlement made with the widow of Nick Spiroplos and recites on page 117 that,

“George Spiroplos, your administrator, in his individual capacity, Milt Spiroplos and Gust Spiroplos purchased all of the right, title, interest and claim of the said Elene Spiroplos Palantas as sole heir at law of Nick Spiroplos, in and to all of the personal

property * * and as a part of said transaction and settlement the said Elene Spiroplos Palantas made, executed, and delivered her deed of conveyance * * conveying to George Spiroplos, Milt Spiroplos and Gust Spiroplos all of their right, title and interest in and to all of the real property belonging to the firm of Spiroplos Brothers consisting of what is known as the * * * Miller ranch * *."

Attached to that final report is a list of assets belonging to the Spiroplos Brothers co-partnership of which the deceased was a member. This list was prepared by Mr. J. L. Soule for the bankrupts and among other things includes the Miller ranch with a valuation of \$1600.00.

The report including the Exhibit is verified by George Spiroplos before his attorney.

This testimony shows conclusively that while title to this land was taken in the name of John Demas it was purchased by Spiroplos Brothers and all times considered as property of the bankrupts. There was no dispute that Spiroplos Brothers bought the land and paid for it, borrowing the money from the First National Bank at the time. It was treated at all times as an asset of Spiroplos Brothers even being included in the mortgage given to the First National Bank by them. It was never considered as an asset by Demas. The

taxes were paid by Spiroplos Brothers and the interest on the mortgage held by the State was likewise taken care of by them. Until the bankruptcy there was never any claim by anyone that this land was not the property of Spiroplos Brothers.

There was an attempted claim made on the part of the bankrupts and by Demas that at the time the land was purchased a charge was made against Demas which was subsequently paid and that the interest and tax charges were likewise subsequently taken care of. It is significant that there is not a scratch of a pen showing the charge of this amount to Demas on any record or book and not a scratch of a pen showing the settlement at any time of any account between Demas and Spiroplos Brothers. This claim rests wholly upon the testimony of George Spiroplos and John Demas entirely unsupported by any fact or circumstance. This testimony cannot overcome the positive record testimony in this case showing this land to be an asset of Spiroplos Brothers and used by Spiroplos Brothers and considered as property owned by them. This testimony is also subject to the same criticism as has been made in connection with the gas engine transaction. The disinterested witnesses in the case and the unquestioned documents show this land to be an asset of Spiroplos Brothers. It was not included in their schedules. It was not included with their assets. The failure to include was absolutely and entirely willful. It was done purposely and with the intention of withholding this

asset whatever its value might be from the Trustee in Bankruptcy.

A good deal the same situation has arisen in connection with the mowing machine as obtains in the gas engine and land transaction. The mowing machine was on the home ranch or Flick place of Spiroplos Brothers and was sold by George Spiroplos to D. L. Forsea, and the money deposited to Spiroplos account in the Bank at Weiser. Spiroplos and Demas then claimed that the mowing machine was the property of Demas and that Spiroplos had turned the money over to Demas which had been received from the sale of the machine. Mr. Dugger, a witness called by the Trustee (pg. 132) testifies that George Spiroplos tried to sell him the mowing machine stating that it belonged to him, had been hid away in the brush but that he would protect Dugger by giving a Bill of Sale dated back a period of one year. This testimony of course is denied by Spiroplos. Dugger also testifies when the offer was made that he came to Baker to find out about it and that upon his return Demas took the matter up with him and found considerable fault because Dugger has referred the matter to the Trustee. The mower being in the possession of the bankrupts would carry a presumption of ownership. This presumption is aided by the fact that George Spiroplos admittedly sold the mowing machine, received the money for it and deposited it to his own credit. It is only contradicted by the testimony of Demas and Spiroplos.

The testimony as to the cattle is not so clear and decisive as that in support of the other matters. The principal thing in connection with the cattle is that Spiroplos did not tell the truth as to what was done with the proceeds from the sale of the cattle. As a matter of fact they were all deposited to the credit of George Spiroplos and his explanation was extremely contradictory and unsatisfactory.

There is not a word of testimony in the entire record disputing the fact that the twelve hundred posts referred to were the posts of the bankrupts prior to the bankruptcy and that they were sold by George Spiroplos to Swisher and were not included in the assets.

As we stated we have discussed in detail only the testimony in connection with the gas engine and the land as in those two respects the testimony is so overwhelming in support of the Findings made by the Master that for those reasons alone the bankrupts are not entitled to a discharge.

We have little more to add to the brief. We believe the testimony overwhelmingly supports the Findings made by the Special Master and that the District Judge was clearly in error in granting a discharge. The record abundantly shows that the bankrupts are not worthy of belief and that their conduct before the Referee and in this proceeding shows conclusively that they deliberately intended to get the benefit at least of the items of property included in the Findings. How much more property

may have gone in the same direction it is impossible to tell.

Some point has been made and no doubt will be urged again that the bankrupts may have been uncertain as to their ownership of the items involved. Even if that be true it was still their duty to include this property in the schedules.

Brandenburg on Bankruptcy 4th Ed. 1096, lays down the rule as follows:

“If it is doubtful whether a specific item should go to the estate it is not for the bankrupt to constitute himself the Judge, concealing the fact, but it is his duty to disclose the transaction that the Court may determine the right.”

It may be urged that compared to the total assets and liabilities of the bankrupts the amount of property concealed is too small to justify an inference of fraudulent intent. That may be true in a case where the record was extremely doubtful as to the intent with which the property was concealed or failed to be included in the schedules. In this case however, where the intent is so overwhelmingly shown the value of the property concealed is of small consequence.

In 3 Remington on Bankruptcy 3rd Ed. 2351, the author lays down this rule,

“But if the fraudulent intent to conceal is proved the discharge should be

refused even though the value of the assets may be small."

This however, again goes back rather to the weight of the evidence than any matter which could be taken up and determined by this Court.

We are of the firm opinion that the Court was in error in granting the discharge and we respectfully submit that the order should be reversed.

Respectfully submitted,

A. A. SMITH,

Attorney for Appellant.

**United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT**

In the Matter of GEORGE S. SPIROPLOS,
MULTIADES SPIROPLOS and GUST SPIR-
OPLOS, partners under the firm name of
George Spiroplos and Brothers,

Bankrupts,

CHAS. BODEAU, as Trustee in Bank-
ruptcy of the estate of George S. Spiroplos,
Miltiades Spiroplos and Gust Spiroplos,

Appellants,

vs.

GEORGE S. SPIROPLOS, MULTIADES
SPIROPLOS and GUST SPIROPLOS,

Appellees.

Upon appeal from the United States District Court for the
District of Oregon.

RESPONDENTS' BRIEF.

Wm. H. PACKWOOD and J. B. MESSICK, of Baker, Ore.,
Attorneys for Appellees.

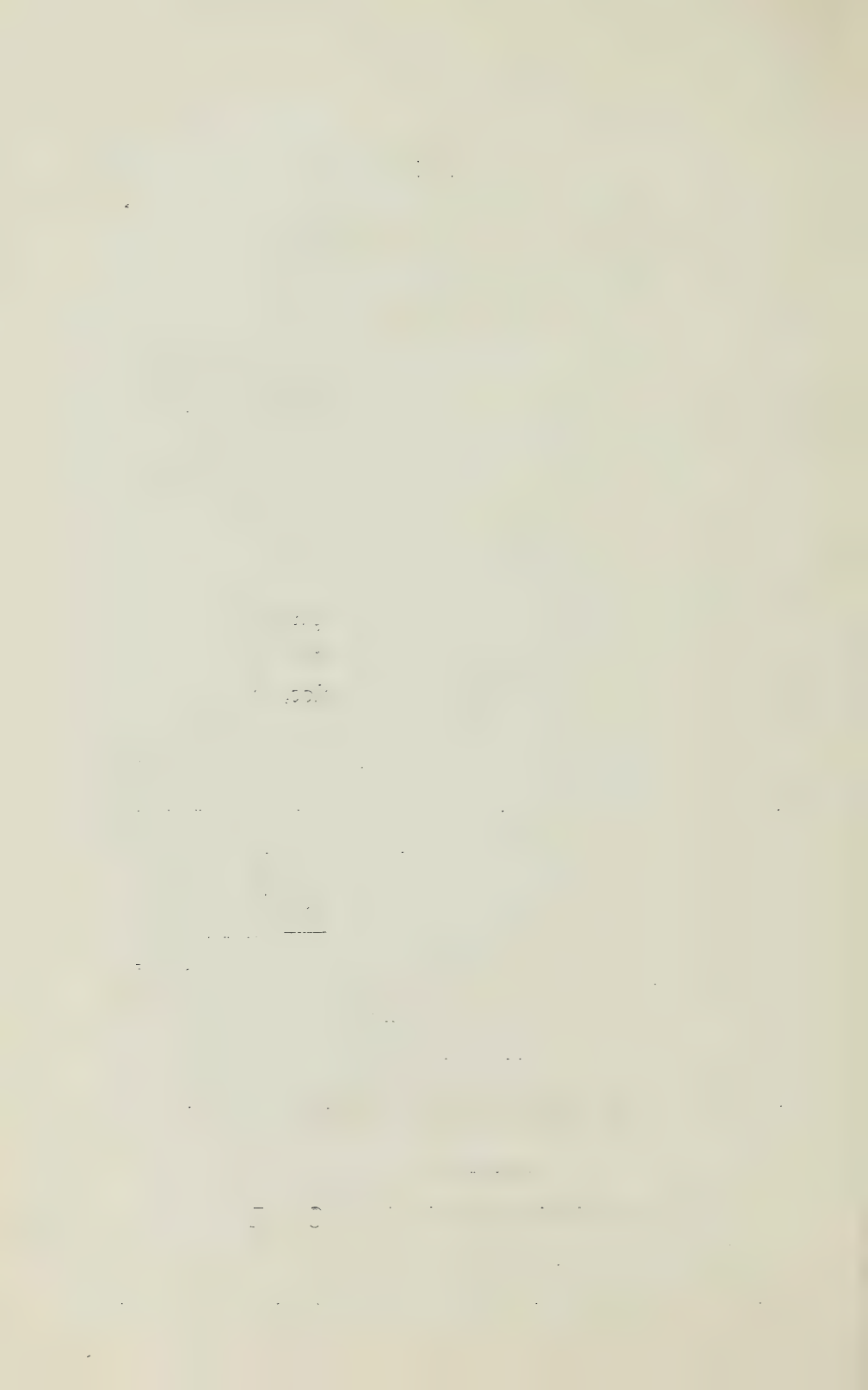
A. A. SMITH, of Baker, Oregon,
Attorney for Appellant.

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No. 4050.

**United States Circuit Court
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SPIROPLOS and GUST SPIROPLOS,

Appellees.

Upon appeal from the United States District Court for the
District of Oregon.

RESPONDENTS' BRIEF.

STATEMENT OF THE CASE

It is shown by Transcript of record, page 1,
that the appellees, bankrupts, filed their petition in

the District Court of the United States for the District of Oregon, praying that they, both as copartners and as individuals be adjudicated bankrupts, and that they be granted a discharge in bankruptcy. This petition was filed on the 30th day of October, 1920. Thereupon an order was made adjudging the appellees bankrupts, both as copartners and individuals, and in due course the matter was referred to Forrest L. Hubbard, Referee in Bankruptcy, at Baker, Oregon.

At a meeting of the creditors, appellant, Charles Bodeau, was elected trustee, and he proceeded to take charge of the assets and property of the bankrupts.

Upon the filing of petitions for a discharge by the bankrupts, a meeting of the creditors was called, and at said meeting the appellant, trustee, was directed and authorized by the creditors to file objections to the discharge of bankrupts.

On the 11th day of July, 1921, appellant made and filed his specifications of objections in said court, as appears from transcript of record, page 16.

It is alleged by the trustee in said specifications of objections, in substance, that the bankrupts, within four months from the date of filing their petition in bankruptcy knowingly and fraudulently concealed certain property and assets from the trustee appellant, and knowingly and fraudulently, made false statements by reason of a failure

by the bankrupts to include such assets and property in their schedules.

The property alleged to have been knowingly and fraudulently concealed, and knowingly and fraudulently omitted from the schedules of the bankrupts' assets, consists of:

1. The Miller Land.
2. Gas Engine.
3. Mowing Machine.
4. Eight head of cattle.
5. Twelve hundred posts.
6. Account against Mrs. Bastian.

Testimony on the trustees objections and specifications aforesaid was taken before Hon. Forrest L. Hubbard, Referee in Bankruptcy, and thereafter, and on the 8th day of May, 1922, he made and filed in said court his findings of fact and conclusions of law, finding against the bankrupts in regard to all of said specifications of objections, with the exception of the account against Mrs. Bastian. (Transcript of record pg. 34.)

Thereupon appellees, bankrupts, filed in said court their objections to the said findings and conclusions of the referee, (transcript of record pg. 44), and thereafter and on the 17th day of July, 1922, Hon. Robert S. Bean, Judge of said court, made and filed an order therein, in words and figures as follows, to-wit:

“This cause was heard by the court upon objections of the trustee herein and certain creditors

to the discharge of the above named bankrupts, and was argued by Mr. F. W. Packwood and Mr. Bert Henry, of counsel for the bankrupts, and by Mr. A. A. Smith, of counsel for the trustee and said creditors; and the court having considered the said objections and the testimony taken before Forrest L. Hubbard as special master.

“It is ORDERED and ADJUDGED that said objections be and the same are hereby overruled and that said bankrupts be granted a discharge herein.”

And on the same day orders were made and filed by the said court granting the appellees, bankrupts, and each of them, a discharge in bankruptcy.

From the judgments and orders of the lower court, appellant has appealed to this court.

Appellant's assignments of error appear in the transcript of record at page 55 thereof, and from an inspection thereof, and from an inspection of the record as an entirety, it will be seen that this is a trial de novo upon the record made before the referee and special master, upon a question of fact solely, that is to say, did or did not the appellees fraudulently and knowingly conceal assets and property and make false statement under oath in reference thereto by failing to include the property above mentioned in their schedules?

It appears from appellant's praecipe for transcript of record on appeal (transcript of record pg. 59,) as well as from the clerk's certificate on the

transcript (transcript of record pg. 54), that the praecipe and statement of testimony certified to this court contains only a portion of the testimony taken before the referee and special master.

Upon the serving and filing of appellants praecipe and statement of testimony to be certified to this court, as aforesaid, appellees, bankrupts, by their counsel, made and filed in the court below, objections to the praecipe and statement of testimony to be certified to this court, on the ground that this being a trial de novo on the record, it was necessary that all of the testimony relating to the matters in controversy should be certified to the appellate court, thus making seasonable objection, and giving appellant timely notice of a defective record. The objections just above referred to do not appear in the transcript of record on appeal.

Appellees have served on appellant's counsel, and have filed in this court, their motion, suggesting a diminution of record, and have moved the court to require appellant to cause to have certified here all of the testimony relating to the matters in controversy, and appearing in the record taken before the special master, and that appellant be required to certify to this court appellees objections to said praecipe and statement of testimony, and to have certified to this court the opinion of the lower setting forth his reasons for granting appellees a discharge in bankruptcy.

POINTS AND AUTHORITIES.

I.

“In equity cases in the Federal courts it is not the practice to make findings of fact or conclusions of law.

Whitney vs. Whitney Elevator etc.,
Co. 180 Fed. 187.

“On appeal from a bankruptcy court to the Circuit Court of Appeals, findings of fact are not required by the bankruptcy act, nor are they desirable.”

In re Myers (S.D. N.Y.) 105 Fed.
353.

II.

Evidence—burden of proof on opposition to discharge.

“When it is charged that bankrupts knowingly and fraudulently concealed property and assets in order to defeat a discharge, it must be proved beyond a reasonable doubt, that is, by evidence sufficient to convict the bankrupt of the offense if he were indicted and put upon trial therefor.”

In re Henneberry 207 Fed. 882, 885,
886.

7 C. J. (Bankruptcy) 371.

“The burden is upon the objecting creditors to establish **by convincing proof** a charge that the bankrupt, since the adjudication, has concealed from his trustee property belonging to his estate, and that the concealment was **knowingly and fraudulently made.**”

In re Salisbury 113 Fed. 833.

In re Fitchard 103 Fed. 744, 745.

Smith v. Keegan 111 Fed. 157, 158.

1st Fed. Stat. Ann. (2nd ed) 679
(note).

“An objection to a bankrupts discharge because of an alleged concealment of assets must be established by **clear and convincing proof**, and is not the subject of mere suspicion or inference.”

In re Howard 180 Fed. 399, 400.

In re Taylor 188 Fed. 479, 484.

III.

“A preference alone, even if it be a voidable one, is not a bar to a discharge. It does not constitute a conveyance of property with intent to delay or defraud creditors.”

In re Frederick 199 Fed. 193, 194,
195.

“It is the duty of the appellant to see that the record is properly presented to the lower court.”

Williams v. Savage (C.A.A. 4th Cir.,
1903).

120 Fed. 497—98—99—500.

“The correctness of findings of fact on a given point is conclusive if the record does not show that it contains all the evidence on that point.”

In re Fench 75 Pac. 278.

ARGUMENT.

This is a trial de novo on appeal from the judgments and orders of the court below discharging the bankrupts, and involves solely a question of fact.

The cause was originally tried before the referee in Bankruptcy at Baker, Oregon, upon objections filed by the trustee, appellant here, objecting to a discharge of the bankrupts. Testimony was taken before the referee on the issues made by the objections filed by the trustee and the answer of the bankrupts thereto, the testimony was reduced to typewriting; and upon the testimony and record so made the referee made findings of fact and conclusions of law recommending that bankrupts be denied a discharge.

It was charged in the trustees objections that the bankrupts knowingly and fraudulently, and with fraudulent intent, concealed from the trustee and the bankrupts creditors certain property consisting of (1) Miller land, (2) Gas Engine, (3) Mowing Machine, (4) Eight head of cattle, (5) Twelve hundred posts, (6) Account against Mrs. Bastian; and that the bankrupts knowingly, willfully and with fraudulent intent made false statements on account of failing to include the foregoing property and assets in their schedules of assts in the bankruptcy proceedings.

Bankrupts filed in the court below their objections to the findings of fact and conclusions of law of the referee, and on the 17th day of July, 1922, after argument of respective counsel for and on behalf of the trustee and of the bankrupts, Hon. Robert S. Bean, Judge, rendered his opinion in this cause, which, omitting the title of the court and cause, is in words and figures as follows:

Portland, Oregon, July 17, 1922.

“In the matter of Spiroplos Brothers, these people were adjudged a bankrupt and in due time filed an application for discharge. Exceptions were filed, or objections, to the petition for discharge and the matter referred to a master and he has reported, recommending that the discharge be not granted.

Now, the estate schedules about seventy-nine thousand dollars of liabilities and forty-four thousand dollars of assets, but it is claimed that the bank-

rupts failed to schedule all of their property, or, more strictly speaking, that they concealed part of it from the trustee and that was the only issue in the case.

There are certain items of property that were not scheduled which the creditors claim belong in fact to the bankrupt. There was some cattle, gas engine and mower and some fence posts, amounting in all to three or four—four or five hundred dollars, I don't remember the exact amount—and one hundred and sixty acres of land. But the evidence shows quite clearly that there is a controversy, or was a controversy as to the ownership of this property. The bankrupt claims that it did not belong to him and so testified, and undertakes to explain the source of title, how he came into possession of it and to whom it belonged, and in this he is corroborated by other witnesses.

A mere failure to schedule or surrender property to a trustee is not per se ipso facto knowingly fraudulent within the meaning of the statute, and, therefore, if it be assumed that the evidence is sufficient to show that this property did in fact belong to the bankrupt, nevertheless it is not sufficient to justify the court in refusing to discharge the bankrupt because there is an honest controversy about the matter; and inasmuch as it is at least doubtful and it does not appear clearly that the omission of the bankrupt to schedule this property was due to any fraudulent intent on his part, but rather more

properly to a mistaken view of his rights under the circumstances, the recommendation of the master will be disapproved.

Now, the master finds that this property belonged to the bankrupt and should have been scheduled, but he does not find definitely, as I recall his report, that the failure to schedule was due to any fraudulent intent on the part of the bankrupt to conceal the property from the trustee; and while the report of the referee or special master in a case of this kind is *prima facie* correct and will not be disturbed unless it is clear that it is not supported by the testimony, I have read this record with great care and I am unable to concur in the conclusion of the master to the effect that the action of the bankrupt in this case was sufficient to justify the court in refusing a discharge."

And on the same day the court below made and entered orders overruling the objections of the trustee in bankruptcy, and granting the bankrupts, and each of them, a discharge.

Counsel for appellant contends in his argument (appellants brief pg. 10) that inasmuch as the court did not disturb the findings of the referee, this court should adopt the findings and conclusions of the referee, and reverse the lower court.

This contention of the appellant is wholly untenable. It is not the practice in equity cases in Federal Courts, nor in bankruptcy cases, on appeal, for the court to make findings of fact or conclusions

of law. They are not required by the bankruptcy act, nor are they desirable. (In re Myers supra). The finding of the court below was and is a general finding, overruling the objections of the trustee to the bankrupts petition for a discharge, and necessarily annulling and setting aside the findings and conclusions of the referee.

Upon a careful consideration of the testimony contained in the transcript before him, and applying the law to the facts shown by the record, Judge Bean was forced to the conclusion that there was not sufficient evidence to substantiate the trustee's objections.

The decided weight of authority is to the effect that where the objections to a discharge of a bankrupt allege the commission of a criminal offence under the Bankruptcy Act, the allegations must be proven **beyond a reasonable doubt**, or at least, **by clear and convincing proof**. (In re Henneberry, 207 Fed. 882, 885, 886; 7 C. J. "Bankruptcy" 371, and other cases cited in appellees brief).

Taking into consideration the testimony and exhibits set forth in appellant's transcript of record, and giving the record the strongest possible construction in favor of appellant, it is not sufficient to prove an inference or suspicion of the fraud and concealment of assets alleged in the trustee's objections; and this will more clearly appear when the whole record is before the court which the appellees have suggested, by motion, to

require appellant to bring up to this court in the proper manner.

In order to attempt to establish the allegations contained in the objections to discharge of the bankrupts, the trustee called George Spiroplos, one of the bankrupts, first on May 26th., and later on June 7th., 1921, and examined this witness at length in regard to the assets and property alleged to have been knowingly and fraudulently concealed from the trustee.

On August 30th and October 24th, 1921, George Spiroplos and John Demas were called as witnesses in behalf of the bankrupts, and each of them testified as to the ownership of the Miller land, the mowing machine and the gas engine, in controversy.

The trustee relies on conflicting statements of George Spiroplos and John Demas in regard to the ownership of the gas engine, the mowing machine and the Miller land.

The record shows that the bankrupts were largely engaged in the sheep business during the period of several years prior to filing their petition in bankruptcy. They had financed several of their countrymen, including John Demas, in the sheep business. About 1917 they financed John Demas, he acquiring about 1000 head of sheep from the bankrupts, giving his note to the bankrupts therefor. It seems that in order to secure a government allotment of grazing land on the U. S. forest reserve it is necessary for the applicant to own land

in his own name, by reason of some rule or regulation of the U. S. land department. Mr. Demas being desirous of securing an allotment upon which to graze his sheep, in the spring of 1918, purchased the Miller land, through George Spiroplos, one of the bankrupts, who advanced the purchase price (\$2200.00), the land being subject to a state mortgage of \$600.00. This deal was consummated through the First National Bank of Baker, Oregon, and the bank had full knowledge of the transaction; and at this point we desire to call the court's attention to the fact that this bank is the principal creditor of the bankrupts, its claim being secured to a certain extent. The record shows that the title to the Miller land was taken directly from Miller and wife by John Demas, in the spring of the year 1918, at a time when the bankrupts were in good financial condition. The transaction concerning the Miller land was open and known to everybody, including the bank, and was made at a time when it could not be said that it was made to hinder, delay or defraud any creditor of Spiroplos Brothers. Mr. William Pollman, a witness for the trustee, testified that he was President of the First National Bank of Baker; that the Miller lands were put in the name of John Demas in order that he might get a reserve rights as the owner of lands, and that he (Pollman) was requested to go to the Forestry office, which he did, to try and secure a reserve right for Mr. Demas (original transcript of testimony pg. 102).

It appears from the testimony (original transcript of testimony of George Spiroplos pages 137 to 154 thereof), that it was customary for Demas and other countrymen of the bankrupts, who had been financed by the bankrupts, to order goods, wares and merchandise through Spiroplos Bros., and to have shipments made and charges made to Spiroplos Brothers. It appears that the mowing machine and gas engine was ordered from the Kleinschmidt Hardware Company, at Baker, Oregon, and it also appears that said company in filling such orders sometimes had shipments made from Nampa and Caldwell and other points in Idaho (evidently on account of cheaper freight rates).

There is some slight conflict in the testimony of John Demas and George Spiroplos in regard to who ordered the gas engine, but the court will take into consideration the fact that these witnesses were testifying in regard to transactions occurring some two years and more prior to the time their testimony was taken and received in this cause, and on the various and different times on which they testified as above set forth it is only reasonable that they might remember the transactions in a different way. The court is not concerned with non-essentials, and is only concerned with the fact as to the ownership of the property and assets in controversy. It matters not how a thing was accomplished, if it was in fact accomplished. The trustee contented himself with the testimony of George

Spiroplos and John Demas. He did not call any other material witnesses except Mrs. McBirney and E. V. Daniels, and the effect of their testimony is that Spiroplos Brothers ordered and paid for the gas engine. As we have stated, and it is a fact, that everything was either ordered by Spiroplos Brothers or through them; that they kept no books, but that once a year, when the wool and lambs were sold, a settlement was made, and then the bills for which Demas was chargeable were paid from the wool and lamb money. It appears that Demas, Spiroplos Bros., and others interested in the same way shipped their wool and their lambs together, and that the money was remitted to and a settlement made at the First National Bank.

The burden of proof was on the trustee to prove his case by clear and convincing proof. He failed to call any of the bankrupts except George Spiroplos. He failed to call any of the officers of the bank to disprove the Miller land transaction, if his contention is true, except that he did call Mr. Pollman who testified as we have above outlined.

It was necessary for John Demas to own land in order to secure a forest reserve grazing right, not as trustee for Spiroplos Brothers, but as absolute owner. This Mr. Pollman well knew, and he undertook to secure such a right for Demas.

The trustee failed to call Miller and his wife in regard to the Miller land transaction, or to show by them that there was a mowing machine on the

Miller ranch when it was sold. He failed to call Chris Coleman to show the ownership of the gas engine.

It appears that George Spiroplos, or Spiroplos Brothers advanced the money for the purchase price of the Miller land for John Demas, and that it was some time before this amount was repaid, and that Spiroplos claimed some kind of an equity in the land, or believed that they had, until the money was repaid, and that they mortgaged the land with other land to the bank, and it was listed in the inventory, and in other estate papers of the estate of Nick Spiroplos; but both George Spiroplos and John Demas testify that the land was purchased for John Demas, in order that he could have land in his own name to secure a grazing right. This testimony is undisputed, and is corroborated by William Pollman, president of the bank. The record shows that the purchase price of the Miller land was repaid through a settlement on account of wool and lamb money received for the parties by the bank; and the record further shows and it is undisputed that the bank received \$5300.00 belonging to John Demas, over and above everything that Demas owed, and still holds and retains that amount, having applied the same on the debt of Spiroplos Brothers, without authority. If the claims of George Spiroplos and John Demas were untrue in regard to this settlement in the bank, why didn't the trustee show the fact by the

books of the bank, and the testimony of the officers of the bank having custody thereof?

John Demas testified to buying the mowing machine in controversy from the Kleinschmidt Hardware Company. That he had just bought the Miller land, and there was no mower on the land. There can be no doubt in the minds of the court as to this transaction when we refer the court to the testimony of V. Nicoleascu, a witness called on behalf of the bankrupts, and who testified that in the spring of the year, 1918, he was working near Home, a small station on the branch line of the O. S. L. Railroad, and that he assisted John Demas to unload a mowing machine from a railroad car at that point, and saw John Demas hitch his team to the mower and take it away. If this fact was not true, it was an easy matter to show by the records of the Railroad Company, and by its agent that no such shipment had in fact been made. It seems to us that there can be no question about the ownership of this mower having been in John Demas. An examination of the entire record will show this even more clearly. The record shows that the bankrupts owned the Flick Ranch, and that there were only two mowers on the Flick ranch, and that these mowers had been used several years. Counsel was unable to find that Spiroplos Brothers had bought any other mowing machines; neither could counsel find that a mower had been shipped to Demas from Baker, by the Kleinschmidt Hardware Company;

but when the testimony shows, as it does in this case, that said company at times shipped machinery and other articles through some of its correspondents in Idaho to the bankrupts and others, this testimony of counsel fails utterly to have any material significance.

As to the cattle there is no dispute about them. The record shows that they were given, or the original cattle, were given to Mrs. George Spiroplos by her mother before marriage. That these cattle increased, and were given to her children by Mrs. Spiroplos, and it conclusively appears that the bankrupts never owned any of the cattle which were sold by the bankrupts.

Taking the record of testimony as a whole, and applying the law to the facts, there was no evidence sufficient to justify the referee in making findings of fact and conclusions of law against the bankrupts

We respectfully insist that the orders and judgments of the court below should be in all things affirmed.

WILLIAM H. PACKWOOD, and
J. B. MESSICK,

Attorneys for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEE CHOY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Territory of Hawaii.

FILED

AUG 2 - 1923

W. A. DOWNEY

United States
Circuit Court of Appeals
For the Ninth Circuit.

LEE CHOY,

Plaintiff in Error,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For LEE CHOY, Plaintiff in Error:

Messrs. THOMPSON, CATHCART & UL-
RICH, 2-15 Campbell Block, Honolulu,
T. H.

For THE UNITED STATES OF AMERICA, De-
fendant in Error:

W. T. CARDEN, Esq., United States District
Attorney, for the Territory of Hawaii.

FRED. PATTERSON, Esq., Assistant United
States District Attorney, for the Territory
of Hawaii. [1*]

In the United States District Court, for the Terri-
tory of Hawaii.

CRIMINAL No. 3259.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEE CHOY,

Defendant.

Statement of Clerk.

TIME OF COMMENCEMENT OF SUIT:

October 21, 1922. Indictment for violation of
the Act of February 9, 1909, as amended by the Act
approved January 17, 1914, as amended by the Act
of May 26, 1922, as charged in Count I, and Viola-

*Page-number appearing at foot of page of original certified Tran-
script of Record.

tion of Section I of the Act approved December 17, 1914, as amended by Section 1006 of the Revenue Act of 1918, re-enacted by Section 1005 of the Revenue Act of 1921, as charged in Count II.

NAMES OF ORIGINAL PARTIES:

United States of America, plaintiff, and Lee Choy, Defendant.

DATES OF FILING OF PLEADINGS:

October 21, 1922: Indictment.

December 9, 1922: Motion for a New Trial.

DECISIONS:

December 9, 1922: Decision filed and entered. De-Bolt, Judge.

PETITION FOR WRIT OF ERROR:

December 12, 1922: Petition for writ of error, etc., filed.

December 19, 1922: Order allowing writ of error, etc., filed. [2]

United States of America,
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties thereto; the several dates when respective pleadings were filed and the time when the decision herein was rendered and the Judge rendering same, in the cause, United States of America, Plaintiff, vs. Lee Choy, Defendant, Criminal Number 3259,

in the United States District Court for the Territory of Hawaii.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 12th day of June, A. D. 1923.

[Seal]

WM. L. ROSA,
Clerk U. S. District Court, Territory of Hawaii.

[3]

In the District Court of the United States, for the Territory of Hawaii. Lee Choy, Defendant-Plaintiff in Error, vs. The United States of America, Plaintiff-Defendant in Error. Stipulation. Filed January 17, 1923. Wm. L. Rosa, Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. [4]

In the District Court of the United States for the Territory of Hawaii.

LEE CHOY,

Defendant-Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error.

**Stipulation Extending Time to and Including
March 31, 1923, for Perfecting Appeal.**

IT IS HEREBY STIPULATED AND AGREED by and between W. T. Carden, United States District Attorney, and Thompson, Cathcart

& Ulrich, counsel for the defendant-plaintiff in error herein, that said defendant-plaintiff in error, may have up to and including the 31st day of March, A. D. 1923, within which to perfect his appeal in the above-entitled cause.

Dated at Honolulu, T. H., this 17th day of January, A. D. 1923.

WILLIAM T. CARDEN,
United States District Attorney.
THOMPSON, CATHCART & ULRICH,
By J. D. FLINT.
Attorneys for Defendant-Plaintiff in Error.

Approved:

J. T. DeBOLT,
Judge, United States District Court, Territory of
Hawaii. [5]

In the United States District Court for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Plaintiff in Error, vs. United States of America, Defendant in Error. Stipulation. Filed Mar. 29, 1923, at 2 o'clock and 20 minutes P. M. Wm. L. Rosa, Clerk. By ———, Deputy Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. [6]

In the United States District Court for the District of Hawaii.

CRIMINAL No. —

LEE CHOY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Stipulation Extending Time to and Including
April 30, 1923, for Perfecting Appeal.**

IT IS HEREBY STIPULATED AND AGREED by and between W. T. Carden, United States District Attorney, and Thompson, Cathcart & Ulrich, counsel for the defendant-plaintiff in error herein, that said defendant-plaintiff in error may have up to and including the 30th day of April, A. D. 1923, within which to perfect his appeal in the above-entitled cause.

Dated, Honolulu, T. H., March 29, 1923.

WILLIAM T. CARDEN,

United States Attorney.

THOMPSON, CATHCART & ULRICH,

Attorneys for Plaintiff in Error,

By J. DONOVAN FLINT.

Approved:

J. T. DeBOLT,

Judge, United States District Court. [7]

In the United States District Court for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time. Filed Apr. 30, '23, at 3 o'clock and 30 minutes P. M. Wm. L. Rosa, Clerk. By ———, Deputy Clerk. William T. Carden, U. S. District Attorney, Federal Building, Honolulu, T. H., Attorney for Defendant in Error. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. [8]

In the United States District Court for the Territory of Hawaii.

CRIMINAL No. —.

LEE CHOY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to and Including May 26, 1923, to Prepare and Transmit Record.

Upon application of counsel for plaintiff in error above named, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED, that the plaintiff in error and the Clerk of this Court be, and they are, hereby allowed until and including the 26th

day of May, 1923, within which to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the records in the above-entitled cause on appeal.

Dated, Honolulu, T. H., this 30th day of Apr., 1923.

J. T. DeBOLT,

Judge, United States District Court.

Approved:

U. S. District Attorney.

THOMPSON, CATHCART & ULRICH,

By J. D. FLINT.

Attorneys for Plaintiff in Error. [9]

In the United States District Court for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time. Filed May 26, 1923. Wm. L. Rosa, Clerk. Wm. F. Thompson, Jr., Deputy Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. William T. Carden, Esquire, United States District Attorney. [10]

In the United States District Court for the Territory of Hawaii.

CR. No. 3259.

LEE CHOY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to and Including June 19, 1923, to Prepare and Transmit Record.

Upon application of counsel for plaintiff in error above named, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals, for the Ninth Circuit,—

IT IS HEREBY ORDERED, that the plaintiff in error and the Clerk of this Court be, and they are, hereby allowed until and including the 19th day of June, 1923, within which to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the records in the above-entitled cause on appeal.

Dated, Honolulu, T. H., this 26th day of May, 1923.

J. T. DeBOLT,

Judge, United States District Court. [11]

In the United States District Court for Territory of Hawaii. Criminal No. 3259. Lee Choy, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time. Filed June 8, '23, at 3:45 P. M. Wm. L. Rosa. William T. Carden, U. S. District Attorney, Federal Building, Honolulu, T. H., Attorney for Defendant in Error. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. [12]

In the United States District Court for the Territory of Hawaii.

CRIMINAL Number 3259.

LEE CHOY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to and Including June 30, 1923, to Prepare and Transmit Record.

Upon application of counsel for plaintiff in error above named, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals, for the Ninth Circuit,—

IT IS HEREBY ORDERED, that the plaintiff in error and the Clerk of this Court be, and they are, hereby allowed until and including the 30th day of June, 1923, within which to prepare and

transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the records in the above-entitled cause on appeal.

Dated, Honolulu, T. H., this 8th day of June,
A. D. 1923.

J. T. DeBOLT,
Judge, United States District Court.

Approved:

WILLIAM T. CARDEN,
U. S. District Attorney.
THOMPSON, CATHCART & ULRICH,
By J. DONOVAN FLINT,
Attorneys for Plaintiff in Error. [13]

In the District Court of the United States for the
Territory of Hawaii.

CR. No. 3259.

LEE CHOY,

Defendant-Plaintiff in Error,
vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Defendant in Error.

Stipulation Re Original Transcript of Testimony.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto, through their respective counsel, that the original transcript of testimony herein shall be forwarded to the Circuit Court of Appeals, Ninth Circuit, in lieu of a copy thereof.

Dated at Honolulu, this 2d day of June, A. D. 1923.

WILLIAM T. CARDEN,
United States District Attorney.
THOMPSON, CATHCART & ULRICH,
By J. D. FLINT,
Attorneys for Lee Choy.

Approved this 2d day of June, A. D. 1923.

(Sgd.) J. T. DeBOLT,
Judge, U. S. District Court, Territory of Hawaii.

Filed June 2, '23, at 9 o'clock and 30 minutes
A. M. Wm. L. Rosa, Clerk. By ———, Deputy Clerk. [14]

Filed Oct. 21, 1922. Wm. L. Rosa, Clerk. By
(Sgd.) Ritchie G. Rosa, Deputy Clerk.

In the United States District Court for the
Territory of Hawaii.

October Term, 1922.

No. 3259.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEE CHOY,
Defendant.

Indictment.**COUNT I.**

Violation of the Act of February 9, 1909, as amended by the Act approved January 17, 1924, as amended by the Act of May 26, 1922.

COUNT II.

Violation of Section I of the Act approved December 17, 1914, as amended by Section 1006 of the Revenue Act of 1918. Re-enacted by Section 1005 of the Revenue Act of 1921.

A TRUE BILL.

(Sgd.) JAMES F. FENWICK,
Foreman.

WILLIAM T. CARDEN,
United States Attorney.

I hereby order a Bench Warrant to issue forthwith on the within indictment for the arrest of the defendant therein named, bail hereby being fixed at \$——.

_____,
Judge, U. S. District Court, Territory of Hawaii.
[15]

In the United States District Court in and for the
Territory of Hawaii.
October Term, 1922.

The United States of America,
District of Hawaii,—ss.

COUNT I.

The Grand Jurors of the United States, empan-

eled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths, present that

LEE CHOY

on or about the 18th day of October, 1922, at and within the said District and within the jurisdiction of this Court, did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney. [16]

In the United States District Court in and for the
Territory of Hawaii.

October Term, 1922.

The United States of America,
District of Hawaii,—ss.

COUNT II.

The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths, present that

LEE CHOY

on or about the 18th day of October, 1922, at and within the said District and within the jurisdiction of this Court, did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt, derivative and preparation of opium and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney. [17]

Filed Nov. 20, 1922. Wm. L. Rosa, Clerk. By
(Sgd.) Ritchie G. Rosa, Deputy Clerk.

In the United States District Court for the Territory of Hawaii.

October Term, 1922.

No. 3259.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

Verdict.

We, the jury duly empaneled and sworn in the above-entitled cause, do hereby find the defendant Lee Choy — guilty as charged in the first count of the indictment herein.

We, the jury duly empaneled and sworn in the above-entitled cause, do hereby find the defendant Lee Choy not guilty as charged in the second count of the indictment herein.

(Sgd.) M. MACINTYRE,

Foreman.

Dated at Honolulu, this 20th day of November, A. D. 1922. [18]

In the United States District Court in and for the Territory of Hawaii. October Term, 1922. United States of America, Plaintiff, vs. Lee Choy, Defendant. Motion for New Trial. Filed Dec. 9, 1922. Wm. L. Rosa, Clerk. By (Sgd.) Ritchie G.

Rosa, Deputy Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Defendant. [19]

In the United States District Court in and for the
Territory of Hawaii.

October Term, 1922.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEE CHOY,
Defendant.

Motion for New Trial.

Comes now the defendant above named, and moves that the verdict of the jury herein on the First Count of the Indictment be vacated and set aside and held for naught, and that he have a new trial herein upon the following grounds:

1. Errors of law committed by the Trial Court in the admission of incompetent, irrelevant and immaterial, and secondary and hearsay evidence offered by the United States prejudicial to this defendant.

2. Errors of law committed by the Trial Court in the exclusion of competent, relevant, and immaterial evidence offered by the defendant.

3. Errors of the Trial Court in refusing to give instructions requested by defendant, to which refusals exceptions were duly taken, and in giving certain instructions requested by the United States

and objected to by defendant, to the giving of which instructions defendant duly excepted.

4. Error of the Trial Court in denying defendant's motion for a directed verdict.

5. That the verdict against the defendant on the First Count of the Indictment and his acquittal on the Second Count is an inconsistent and impossible verdict. [20]

6. That the verdict on the First Count of the Indictment is contrary to the law and the evidence and the weight of the evidence, and is an impossible verdict.

This motion is based upon the records and proceedings had herein.

Dated, Honolulu, T. H., December 8, 1922.

LEE CHOY,

Defendant Above Named.

THOMPSON, CATHCART & ULRICH,

By (Sgd.) J. DONOVAN FLINT,

His Attorneys. [21]

United States of America,
District of Hawaii,—ss.

In the District Court of the United States in and
for the District and Territory of Hawaii.

No. 3259.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

Sentence.

Now, upon motion of William T. Cárden, United States District Attorney, in and for the District and Territory of Hawaii, the said defendant, Lee Choy, is brought before the bar of this court for judgment and sentence upon his conviction of unlawfully violating the Act of May 26, 1922, whereupon, the Court, addressing the defendant, said:

“You, Lee Choy, were on October 21, 1922, duly and regularly indicted by the Grand Jury in and for the Territory and District of Hawaii for certain alleged crimes, the indictment therefor being in two counts. The first count of the said indictment charged you with the commission of the crime of unlawfully, fraudulently, knowingly and feloniously receiving, concealing, buying, selling, and facilitating the transportation, concealment and sale, of, after having been unlawfully imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium.

“The second count of the said indictment charged you with the commission of the crime of knowingly, unlawfully, fraudulently and feloniously purchasing, selling, dispensing and distributing 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium was so purchased, sold,

dispensed and distributed by you, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package. [22]

“Upon the said indictment so returned and charging you with the crimes aforesaid you were duly and regularly arraigned on October 23, 1922, to which indictment on the date last mentioned you entered a plea of not guilty.

“Upon this indictment and the charges therein made, you have had a fair and impartial trial in this court by a duly and lawfully constituted jury, which jury, on November 20, 1922, after due consideration, returned a verdict against you, finding you guilty of the crime aforesaid as charged in count one of the said indictment, and finding you not guilty of count two of said indictment.

“The Court now asks you if you have anything to say why judgment and sentence should not now be pronounced against you.”

The defendant personally said nothing, but his counsel addressed the Court for leniency.

Whereupon the Court proceeded as follows:

“It is considered and adjudged by the court that you, Lee Choy, are guilty of the crime aforesaid as charged in count one of the said indictment and as found by the verdict of the jury herein, returned on November 20, 1922; and it is, therefore, now considered, ordered and adjudged, and it is the judgment and sentence of the court, that you, Lee Choy, be im-

prisoned in Oahu Prison, in the City and County of Honolulu, Territory of Hawaii, for the term of two years and pay a fine of Two Hundred Fifty Dollars and costs of these proceedings. Let Mittimus issue accordingly."

Dated at Honolulu, T. H., December 9th, 1922.

(Sgd.) J. T. DeBOLT,

Judge, United States District Court.

Entered in J. D. Book, at folio #3328. [23]

In the District Court of the United States for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Defendant-Plaintiff in Error, vs. The United States of America, Plaintiff-Defendant in Error. Notice of Presentation of Petition for Writ of Error and Supersedeas and Bail. Filed Dec. 12, 1922. Wm. L. Rosa, Clerk. By (Sgd.) Ritchie G. Rosa, Deputy Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. W. T. Carden, United States District Attorney for the District and Territory of Hawaii, Attorney for Plaintiff-Defendant in Error. [24]

In the District Court of the United States for the Territory of Hawaii.

CRIMINAL No. 3259.

LEE CHOY,

Defendant-Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error.

Notice of Presentation of Petition for Writ of Error and Supersedeas and Bail.

To the United States of America, the Above Defendant in Error, and to Its Attorney,

YOU AND EACH OF YOU WILL HEREBY PLEASE TAKE NOTICE: That on the 12th day of December, 1922, at the hour of 2 o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, we will present to the said Court a petition for writ of error and supersedeas and bail herein, and assignment of errors herein, and shall move said Court to allow said writ of error and supersedeas and bail, and to direct the issuance of the same, and the citation herein.

Copies of said petition for writ of error and supersedeas and bail, and of the assignment of errors herein, are made part of this notice, attached hereto and served herewith.

Dated, Honolulu, T. H., this 12th day of December, 1922.

LEE CHOY,

Plaintiff in Error,

By THOMPSON, CATHCART & ULRICH,
J. DONOVAN FLINT,

His Attorneys.

Receipt of copy of the foregoing notice and receipt of the various papers therein referred to is hereby admitted, this 12th day of December, 1922.

(Sgd.) WILLIAM T. CARDEN,
United States District Attorney. [25]

In the District Court of the United States for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Defendant-Plaintiff in Error, vs. The United States of America, Plaintiff-Defendant in Error, Petition for Writ of Error and Supersedeas and Bail. Filed Dec. 12, 1922. Wm. L. Rosa, Clerk. By (Sgd.) Ritchie G. Rosa, Deputy Clerk. Thompson, Cathcart, & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. W. T. Carden, United States District Attorney for the District and Territory of Hawaii, Attorney for Plaintiff-Defendant in Error. [26]

In the District Court of the United States for the
Territory of Hawaii.

LEE CHOY,

Defendant-Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error,

**Petition for Writ of Error and Supersedeas and
Bail.**

To the Honorable JOHN T. DeBOLT, Judge of the
District Court of the United States, for the
Territory of Hawaii,

Now comes LEE CHOY, plaintiff in error in the above-entitled cause, said cause being originally entitled in said Court, "The United States of America, Plaintiff, vs. Lee Choy, Defendant, Criminal No. 3259," wherein Lee Choy, plaintiff in error herein, was defendant; and the said Lee Choy says that on,

to wit, the 20th day of November, A. D. 1922, the jury in said cause returned a verdict in favor of the plaintiff, the United States of America, defendant in error herein, and thereafter, and on, to wit, the 9th day of December, A. D. 1922, said Court entered a judgment and sentence therein in favor of the United States of America and against the said Lee Choy, in which said verdict and judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of said defendant, Lee Choy, the plaintiff in error herein, all of which will in more detail appear in the assignment of errors which is filed with this petition.

WHEREFORE, this plaintiff in error prays that a writ of error be issued in his behalf out of the United States Circuit [27] Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transfer of the record, proceedings and papers of said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; that said writ of error may be made a supersedeas; that your petitioner be released on bail in an amount to be fixed by the Judge thereof, pending the final disposition of said writ of error; and that further proceedings in the United States District Court for the Territory of Hawaii be suspended and stayed until the determination of the said writ of error by the Ninth Circuit Court of Appeals.

Dated at Honolulu, T. H., this 12th day of December, 1922.

LEE CHOY,
Plaintiff in Error,
By THOMPSON, CATHCART & ULRICH,
His Attorneys.
(S.) J. DONOVAN FLINT.

Receipt of copy of the foregoing petition for writ of error and supersedeas and bail, and receipt of a copy thereof, are hereby admitted this 12th day of December, 1922.

WILLIAM T. CARDEN,
United States District Attorney. [28]

In the District Court of the United States for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Defendant-plaintiff in Error, vs. The United States of America, Plaintiff-defendant in Error. Assignment of Errors. Filed Dec. 12, 1922. Wm. L. Rosa, Clerk. By (Sgd.) Ritchie G. Rosa, Deputy Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. [29]

In the District Court of the United States for the
Territory of Hawaii.

CRIMINAL No. —.

LEE CHOY,

Defendant-Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error,

Assignment of Errors.

Now comes LEE CHOY, plaintiff in error, who was defendant in the original cause entitled, the United States of America, Plaintiff, vs. Lee Choy, Defendant, Criminal No. 3259, and in connection with his petition for a writ of error, says that in the record, proceedings, and judgment aforesaid, error has intervened to his prejudice, to wit:

1. That the Court erred in denying plaintiff in error's motion for directed verdict as to Count Two of the Indictment, on the following grounds:

A. That there is no evidence in the record of the purchase, sale, or distribution of opium without the tax-paid stamp required by law.

B. That there was no evidence in the record of any possession of opium by the defendant, now plaintiff in error.

3. That the Court erred in directing the jury to find the defendant not guilty at the close of the whole case.

4. That the Court erred in charging the jury as follows:

You are instructed that if you find from the evidence beyond a reasonable doubt that the United States has proved that the defendant was in the actual possession of twenty-five tael tins of opium in the manner and form as charged in Count Two of the indictment and that there were no tax-paid stamps on the containers of said opium, that such facts taken by themselves shall be presumptive evidence of the violation of the acts and on this evidence alone you are authorized to find the defendant guilty unless by some other evidence in the case [30] or some other facts or circumstances in the case have raised in your minds a reasonable doubt as to whether or not the said possession by the defendant was lawful.

5. That the Court erred in charging the jury as follows:

The word "possession" may mean either the conscious having, holding or detaining of property in one's power or control, and may refer to one's own property or to the property of another, and may be either permanent or temporary possession. The word "possession" is not limited to manual touch or personal custody.

6. That the Court erred in not charging the jury as requested by the defendant as follows:

I direct you, Gentlemen of the Jury, that you shall find the defendant not guilty of the offense charged in Count One of the Indictment.

7. That the Court erred in not charging the jury as requested by the defendant as follows:

I direct you, Gentlemen of the Jury, that you should find the defendant not guilty of the offense charged in Count Two of the Indictment.

8. That the Court erred in not charging the jury as requested by the defendant as follows:

I instruct you, Gentlemen of the Jury, that the indictment preferring this charge against the defendant is no evidence whatever of his guilt; it is simply an accusation or charge; and no juror should suffer himself to be influenced in the slightest degree by the fact that this indictment has been returned against the defendant.

(Sackett—Vol. 2—Pg. 1651.)

9. That the Court erred in not charging the jury as requested by the defendant as follows:

The jury are further instructed that the presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit the defendant, unless the evidence in the case convinces them of his guilt as charged, beyond all reasonable doubt.

(Sackett—Vol. 2—Pg. 1694.) [31]

10. That the Court erred in not charging the jury as requested by the defendant as follows:

The Court instructs the jury that certain police officers and detectives have testified in

this case on behalf of the United States, and that, under the law, in weighing their testimony greater care should be used, because of the natural and unavoidable tendency of such persons in procuring and stating evidence against the accused.

Sackett—Vol. 2—Pg. 1771.)

11. That the Court erred in not charging the jury as requested by the defendant as follows:

The testimony of detectives and informers, whose business it is to secure evidence, should be examined and weighed with greater care than that of witnesses wholly disinterested.

Hughes—Sec. 224—Pg. 216.)

12. That the Court erred in not charging the jury as requested by the defendant as follows:

If after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting for the simple reason that a majority of the jury should be in favor of a verdict of not guilty.

Hughes—Sec. 301—Pg. 299.)

13. That the Court erred in not charging the jury as requested by the defendant as follows:

Each juror must be satisfied beyond a reasonable doubt that the defendant is guilty as charged, before he can, under his oath, consent to a verdict of conviction. If any one of the jurors, after having duly considered all the

evidence, and after having consulted with his fellow-jurymen, entertains such reasonable doubt, the jury cannot, in such case, find the defendant guilty.

Hughes—Sec. 301—Pg. 299.)

14. That the Court erred in not charging the jury as requested by the defendant as follows:

The Court instructs the jury that it is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant. They must exclude to a moral certainty every other reasonable hypothesis. [32]

15. That the verdict of the jury is not supported by any competent evidence in the record.

16. That the Court erred in overruling and denying motion of the defendant for a new trial.

17. That the verdict against the defendant on the first count and his acquittal on the second count is an inconsistent and impossible verdict and cannot be sustained.

18. That the verdict on the first count of the indictment is contrary to the law and the evidence and the weight of the evidence, and is an impossible verdict.

WHEREFORE, said plaintiff in error prays that the said judgment of the District Court of the United States be reversed and held for naught.

Dated at Honolulu, T. H., December 12th, A. D. 1922.

LEE CHOY,
Plaintiff in Error.
THOMPSON, CATHCART & ULRICH,
By J. DONOVAN FLINT,
His Attorneys. [33]

In the District Court of the United States, for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Defendant-Plaintiff in Error, vs. the United States of America, Plaintiff-Defendant in Error. Order Allowing Writ of Error and Admitting Defendant to Bail. Filed December 19, 1922, at 3 o'clock P. M. Wm. L. Rosa, Clerk. By (Sgd.) Wm. F. Thompson, Jr., Deputy Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. W. T. Carden, United States District Attorney, for the Territory of Hawaii, Attorney for Plaintiff-Defendant in Error. [34]

In the District Court of the United States for the
Territory of Hawaii.

CRIMINAL No. —.

LEE CHOY,

Defendant-Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff-Defendant in Error.

Order Allowing Writ of Error and Admitting Defendant to Bail.

IT IS HEREBY ORDERED that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, for the final judgment heretofore given, made, filed and entered up in the above-named court in the above-named cause, originally entitled "The United States of America, Plaintiff, vs. Lee Choy, Defendant, Criminal No. 3259," upon the issues there joined between the said United States of America and the above-named Lee Choy, and the said writ of error is hereby allowed upon the petition of the said Lee Choy, and

IT IS ORDERED that a Citation be issued to the defendant in error, and that a certified transcript of the record and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

And it now appearing that a citation has been served in the cause, IT IS NOW ORDERED that a writ of error be allowed as above stated to operate as a supersedeas, and the defendant [35] be admitted to bail upon furnishing a bond in the penal sum of Six Thousand Dollars (\$6,000.00), conditioned according to law, to be approved by me.

Dated, Honolulu, T. H., this 19th day of December, 1922.

(S.) J. T. DeBOLT,

Judge, United States District Court for the Territory of Hawaii. [36]

In the District Court of the United States for the Territory of Hawaii. Criminal No. ——. Lee Choy, Defendant-Plaintiff in Error, vs. The United States of America, Plaintiff-Defendant in Error. Writ of Error. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. W. T. Carden, United States Dist. Atty., for the Territory of Hawaii, Attorney for the United States of America, Plaintiff-Defendant in Error. [37]

In the District Court of the United States for the Territory of Hawaii.

CRIMINAL No. ——.

LEE CHOY,

Defendant-Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error.

Writ of Error.

United States of America,

Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable JOHN T. DeBOLT, Judge of the United States District Court for the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in the giving, making, rendition, entering and filing of the final judgment in that certain matter in the aforesaid District Court before you, between the United States of America, plaintiff, being the de-

pendant in error herein, and Lee Choy, defendant, being the plaintiff in error herein, manifest errors have happened to the great prejudice and damage of said Lee Choy, plaintiff in error as appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the United States Court of Appeals in the Ninth Circuit, at the City and County of San Francisco, State of [38] California, together with this writ, so that you have the same at the said place in the said City and County of San Francisco, State of

January W. L. R.

California, on the 19th day of ~~December~~,

A. D. 1923; that the said record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals of the Ninth Circuit, may cause further to be done therein to correct those errors, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 12th day of December, A. D. 1922.

ATTEST, my hand and the seal of the United States District Court for the Territory of Hawaii, at the Clerk's office at Honolulu, City and County of

Honolulu, Territory of Hawaii, this 19th day of December, A. D. 1922.

[Seal]

WM. L. ROSA,
Clerk.

By Wm. F. Thompson, Jr.,
Deputy Clerk, United States District Court, Territory of Hawaii.

Service of the above writ and receipt of a copy thereof are hereby admitted this 19th day of December, 1922.

WILLIAM T. CARDEN,
United States District Attorney. [39]

In the District Court of the United States for the Territory of Hawaii. Criminal No. ——. Lee Choy, Defendant-Plaintiff in Error, vs. The United States of America, Plaintiff-Defendant in Error. Citation on Writ of Error. December 19, 1922, 3 P. Wm. L. Rosa. Wm. F. Thompson, Jr. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. W. T. Carden, United States Dist. Atty. for Territory of Hawaii, Attorney for Plaintiff-Defendant in Error. [40]

In the District Court of the United States for the
Territory of Hawaii.

CRIMINAL No. —.

LEE CHOY,

Defendant-Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error.

Citation on Writ of Error.

The President of the United States of America, to
the United States of America and Its Counsel,
GREETING:

You and each of you are hereby cited and admonished to appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, within thirty days from and after the day this citation bears date, pursuant to a Writ of Error filed in the office of the Clerk of the United States District Court for the Territory of Hawaii, in the above-entitled cause, wherein the United States is plaintiff-defendant in error, and Lee Choy is defendant-plaintiff in error, to show cause if any there be, why the verdict made and entered in the above-entitled cause on the 20th day of November, 1922, and the sentence imposed upon said plaintiff-defendant in error upon the 9th day of December, A. D. 1922, as in said writ of error assigned and thereby appealed from, should not be corrected and

reversed, and why speedy judgment should not be done to the party plaintiff in error in that behalf.

WITNESS the Honorable JOHN T. DeBOLT,
United States District Judge in and for the Territory of Hawaii, this 19th day of December, 1922.

J. T. DeBOLT,

Judge United States Dist. Ct., T. H.

[Seal]

Attest: WM. L. ROSA,

Clerk.

By Wm. F. Thompson, Jr.,

Deputy Clerk, United States Dist. Ct., T. H.

Service of the within and foregoing citation is hereby accepted, and receipt of a copy thereof acknowledged, this 12th day of December, 1922.

United States District Attorney. [41]

In the District Court of the United States for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Defendant-Plaintiff in Error, vs. The United States of America, Plaintiff-Defendant in Error. Recognizance for Costs. Filed Dec. 19, 1923. (S.) Wm. L. Rosa, Clerk. By———, Deputy Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. [42]

In the District Court of the United States for the
Territory of Hawaii.

CRIMINAL No. 3259.

LEE CHOY,

Defendant-Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error.

Recognizance for Costs.

United States of America,

Territory of Hawaii,—ss.

BE IT REMEMBERED that on this 19th day of December, A. D. 1922, before me, William L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, duly appointed by said Court, and duly qualified and acting as such Clerk, personally came Lee Choy, as principal, and Chun Hoon and Pang See, as sureties, and jointly and severally acknowledged themselves to owe the United States of America the sum of One Thousand Dollars (\$1,000.00) to be levied on their goods and chattels, lands and tenements, if default be made in the conditions following; to wit:

THE CONDITION OF THIS RECOGNIZANCE IS SUCH that:

WHEREAS, to wit, heretofore and on, to wit, the 20th day of November, A. D. 1922, the above-named plaintiff in error, Lee Choy, defendant in the original cause entitled, "United States of

America, Plaintiff, vs. Lee Choy, Defendant, Criminal Number 3259," was by a petit jury in the United States District Court for the Territory of Hawaii found guilty of transporting opium, and thereafter, on, to wit, the 9th day of December, A. D. 1922, the said Lee Choy was by said Court sentenced to imprisonment for a period of two (2) years, and to pay a fine of two hundred fifty dollars (\$250.00), and to pay the costs of said proceedings;

WHEREAS, thereafter and on, to wit, the 19th day of December, A. D. 1922, the Honorable J. T. DeBolt, one of the [43] Judges of the United States District Court for the Territory of Hawaii, did duly and regularly order that a writ of error be allowed in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, City and County of San Francisco, State of California, from the final judgment theretofore, as aforesaid, given, made, filed, and entered by the above-named court in the above-named cause originally entitled "United States of America, Plaintiff, vs. Lee Choy, Defendant, Criminal Number 3259";

WHEREAS, heretofore, on, to wit, the 19th day of December, 1922, a citation upon said writ of error was duly and regularly issued in the above-entitled court and cause directed to the United States of America and its counsel, citing and admonishing them and each of them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, City and

County of San Francisco, State of California, within thirty (30) days from and after the day of the date of said citation to show cause, if any there be, why the verdict entered in the above-entitled cause on the 20th day of November, 1922, and the sentence imposed upon said plaintiff in error on the 9th day of December, A. D. 1922, should not be corrected and reversed, and speedy judgment should not be done to the party plaintiff in error in that behalf; and

WHEREAS, the Honorable J. T. DeBolt, one of the Judges of said United States District Court for the Territory of Hawaii, did regularly order that pending such writ of error the said Lee Choy, give his recognizance with sureties in the sum of One Thousand Dollars (\$1,000.00) conditional upon him, the said Lee Choy, prosecuting the said writ of error to effect, and if he fail to make his plea good, answer all costs thereon. [44]

NOW, THEREFORE, shall Lee Choy, plaintiff in error, prosecute his said writ of error to effect, and if he fail to make his plea good, answer all costs, thereon, then this obligation to be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the above-bounden principal and sureties have hereunto set their respective hands this 19th day of December, A. D. 1922.

(Sgd.)	LEE CHOY,
	Principal.
(Sgd.)	CHUN HOON,
(Sgd.)	PANG SEE,
	Sureties.

United States of America,
Territory of Hawaii,—ss.

We, Chun Hoon and Pang See, being each severally sworn, depose and say: That he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii; that he is worth the sum of one thousand dollars (\$1,000.00) over and above all his just debts, liabilities and exemptions, and that he has property equal to said amount in the Territory of Hawaii and subject to execution, levy and bail.

(Sgd.) CHUN HOON.

(Sgd.) PANG SEE.

Subscribed and sworn to before me this 19th day of December, A. D. 1922.

[Seal] (Sgd.) WM. F. THOMPSON, Jr.,
Deputy Clerk of the United States District Court
for the Territory of Hawaii.

Approved as to form and sufficiency of sureties.

(Sgd.) J. T. DeBOLT,
Judge of the United States District Court for the
Territory of Hawaii, Presiding.

Approved as to form.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney. [45]

In the District Court of the United States for the Territory of Hawaii. Criminal No. 3259. Lee Choy, Defendant-Plaintiff in Error, vs. The United States of America, Plaintiff-Defendant in Error.

Recognizance. Filed Dec. 19, 1922. (Sgd.) Wm. L. Rosa, Clerk. Thompson, Cathcart & Ulrich, 2-15 Campbell Block, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. [46]

In the District Court of the United States for the
Territory of Hawaii.

CRIMINAL No. 3259.

LEE CHOY,

Defendant-Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff-Defendant in Error.

Recognizance.

KNOW ALL MEN BY THESE PRESENTS, That I, Lee Choy, of Honolulu, City and County of Honolulu, Territory of Hawaii, as principal, and Chun Hoon and Pang See of the same place, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Six Thousand Dollars (\$6,000.00) to be paid the United States of America, to which payment well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

WHEREAS, lately, on the 20th day of November, A. D. 1922, the above-named plaintiff in error, Lee Choy (defendant in the original cause entitled "United States of America, Plaintiff, vs. Lee Choy, Defendant, Criminal No. 3259"), by a petit jury

in the United States District Court for the Territory of Hawaii, found guilty in a cause pending in said court, and a sentence was imposed upon said plaintiff in error on the 9th day of December, 1922; and

WHEREAS, on, to wit, the 19th day of December, 1922, the Honorable John T. DeBolt, one of the Judges of the said United States District Court for the Territory of Hawaii, did duly and regularly order that a writ of error be allowed in the above-entitled [47] cause to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, City and County of San Francisco, State of California, from the final judgment and sentence given, made, filed and entered in the above-named cause, entitled originally, the "United States of America, Plaintiff, vs. Lee Choy, Defendant, Criminal No. 3259"; and

WHEREAS, to wit, on the 19th day of December, A. D. 1922, a citation upon said writ of error was duly and regularly issued, directed to the said United States of America and its counsel citing and admonishing them, and each of them, to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the City and County of San Francisco, State of California, within thirty (30) days from and after the date of said citation, to show cause, if any there be, why the verdict made and entered in the above-entitled cause on the 20th day of November, A. D. 1922, and the sentence imposed upon said plaintiff in error on the 9th day of December, A. D. 1922,

should not be corrected and reversed, and why speedy justice should not be done to the party plaintiff in error in that behalf, and

WHEREAS, the Honorable John T. DeBolt, one of the Judges of said United States District Court for the Territory of Hawaii, did regularly order that, pending such writ of error, the said Lee Choy give his recognizance with surety in the sum of Six Thousand Dollars (\$6,000) for his appearance before the said United States Circuit Court of Appeals for the Ninth Circuit, and that upon giving such recognizance the said Lee Choy be released from custody.

NOW, THEREFORE, if the said Lee Choy shall personally be and appear before the United States Circuit Court of Appeals for the Ninth Circuit on the 19th day of January, A. D. 1923, at San Francisco, City and County of San Francisco, State of [48] California, from day to day and from term to term thereafter, and from day to day of each term thereafter, until discharged by order of said Court, then and there to answer to the United States of America and abide the order and judgment of said United States Circuit Court of Appeals of the Ninth Circuit, and not depart the same without leave, and in the event of said writ of error being dismissed and/or the judgment and sentence of said United States District Court for the Territory of Hawaii, being affirmed on appeal, render himself in execution thereof, then this obligation to be void, otherwise to remain in full force, virtue and effect.

IN WITNESS WHEREOF the above-named principal and sureties do hereunto set their hands this 19th day of December, A. D. 1922.

(Sgd.) LEE CHOY,
Principal.

(Sgd.) CHUN HOON,
Surety.

(Sgd.) PANG SEE,
Surety.

United States of America,
Territory of Hawaii,—ss.

We, Chun Hoon and Pang See, being each severally sworn, depose and say: That he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, and is worth the sum of Six Thousand Dollars (\$6,000) over and above all his just debts, liabilities and exemptions, and that he has property equal to the said amount within the Territory of Hawaii, and subject to execution, levy and sale.

(Sgd.) CHUN HOON.
(Sgd.) PANG SEE.

Subscribed and sworn to before me this 19th day of December, 1922.

[Seal] (Sgd.) WM. F. THOMPSON, Jr.,
Deputy Clerk of the United States District Court
of the Territory of Hawaii.

Approved as to form and sufficiency of sureties.

(Sgd.) J. T. DeBOLT,
Judge of the District Court of the United States,
for the Territory of Hawaii.

Approved as to form.

(Sgd.) WILLIAM T. CARDEN,
United States District Attorney. [49]

In the United States District Court for the Territory of Hawaii. United States of America, Plaintiff, vs. Lee Choy, Defendant. Charge to the Jury. Filed Nov. 20, '22. (Sgd.) Wm. L. Rosa, Clerk. [50]

In the United States District Court for the Territory of Hawaii.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

Charge to the Jury.

GENTLEMEN OF THE JURY:

The indictment in this case is in two counts.

The first count charges that the defendant on or about the 18th day of October, 1922, at and within the Territory and District of Hawaii, did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, twenty 5-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully

imported and brought into the United States, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

The second count charges that the defendant on or about the 18th day of October, 1922, at and within the said District, did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute twenty 5-tael tins of opium from packages to which there was not then and there affixed the tax-paid [51] stamp required by law, which said opium then and there was a compound, manufacture, salt, derivative and preparation of opium and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package; and not being then and there taken from an original stamped package; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

In this connection, I instruct you, gentlemen of the jury, that the only offenses with which the defendant is charged in this case, and the only offenses of which it is legally possible for you to find him guilty, are the offenses charged and set forth in counts one and two of the indictment which I have just read to you. There is no charge made against the defendant in this case for in any way dealing with any other opium; as for example, the opium which the prosecuting witness, Mrs. Alapa, testified that she carried from the boat on her first trip on the night of October the 18th.

And I further instruct you, gentlemen of the jury, in this connection, that the evidence concerning the first lot of opium which the prosecuting witness testified that she brought ashore from the steamer "President Wilson" was admitted in evidence solely as bearing upon the probability or improbability of the defendant having received, concealed, bought, sold, or facilitated the transportation, concealment, or sale, after importation, of the particular twenty 5-tael tins of opium received in evidence in this case, and also as bearing upon the probability or improbability of his having purchased, sold, dispensed, or distributed, those particular twenty 5-tael tins of opium without having had affixed to them the tax stamp required by law. [52]

And, further in this connection, I instruct you that since May 26, 1922, it has been unlawful to fraudulently or knowingly receive, conceal, buy, sell or in any manner to facilitate the transportation, concealment, or sale, after unlawful importation of opium, knowing the same to have been imported contrary to law. [53]

INSTRUCTION No. 2.

I instruct you, Gentlemen of the Jury, that the defendant in this case is not charged with having unlawfully imported or smuggled opium into the United States, but only with having unlawfully received, concealed, bought, sold and facilitated the transportation, concealment and sale of opium after it had already been unlawfully imported and brought into the United States, and therefore, unless you find from the evidence that as a matter of fact this

defendant did receive, or did conceal, or did buy, or did sell, or did facilitate the transportation, concealment, or sale of this particular opium after and not before it had been imported and brought into the United States, then you must find the defendant not guilty of the offense charged in count one of the indictment. [54]

INSTRUCTION No. 3.

I further instruct you, Gentlemen of the Jury, that the defendant is charged in Count Two of the Indictment of having actually purchased, sold and dispensed and distributed the particular twenty five-tael tins of opium in evidence in this case, and unless you can find from the evidence that, as a matter of fact, at the time of his arrest and of the finding of the indictment against him, he had actually purchased, sold, dispensed or distributed that particular opium which is in evidence in this case, then you must find the defendant not guilty of the offense so charged in said count two of the indictment. [55]

INSTRUCTION No. 5.

You are instructed that if you find from the evidence beyond a reasonable doubt that the United States has proved that the defendant was in the actual possession of twenty five-tael tins of opium in the manner and form as charged in Count Two of the indictment and that there were no tax-paid stamps on the containers of said opium, that such facts taken by themselves shall be presumptive evidence of the violation of the act and on this evidence alone you are authorized to find the defendant

guilty unless by some other evidence in the case or some other facts or circumstances in the case have raised in your minds a reasonable doubt as to whether or not the said possession by the defendant was lawful. [56]

INSTRUCTION No. 6.

The word "possession" may mean either the conscious having, holding or detaining of property in one's power or control, and may refer to one's own property or to the property of another, and may be either permanent or temporary possession. The word "possession" is not limited to manual touch or personal custody.

In this connection I charge you that if you find and believe from the evidence beyond a reasonable doubt that the defendant and Eunis G. Alapa were acting together and in concert in the acts as charged against the defendant in the indictment, then, irrespective of the individual acts of either in the transaction such individual acts, would be the acts of each and both of them. The actual possession therefore of the said Eunis G. Alapa of the opium in question, if you so find that she had such actual possession, would be the possession of the defendant Lee Choy. [57]

INSTRUCTION No. 7.

You are instructed that the statute under which this defendant is charged in Count One of the indictment provides that when on trial for its violation, the defendant is shown to have, or to have had, possession of the said opium, such possession shall be deemed sufficient evidence to authorize conviction

unless the defendant shall explain the possession to the satisfaction of the Jury. In this connection you are instructed that if the defendant has been shown to have been in possession of opium beyond a reasonable doubt, then it becomes incumbent upon him to show that his possession was lawful or innocent; in other words, the United States must show beyond a reasonable doubt, possession by defendant and that the thing possessed was such opium and defendant had knowledge thereof; but when such possession by the defendant of such opium is so shown, then, as the terms of the statute provide, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain his possession to the satisfaction of the jury or, unless in the evidence somewhere, whether introduced by or in behalf of the government, or in the circumstances appearing in the evidence, or in the nature of the possession itself, there is a satisfactory explanation or a satisfactory accounting for such possession—such an accounting or explanation made by the defendant or by the testimony in the case, as raises in your minds a reasonable doubt of the defendant's guilt. [58]

INSTRUCTION No. 17.

REASONABLE DOUBT.

The Court further instructs you, Gentlemen of the Jury, that the indictment in this case is of itself a mere formal accusation or charge against the defendant, and is not of itself any evidence of the guilt of the defendant. The burden of proof in this case is upon the United States, and the

law, independent of the evidence, presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves him guilty to your satisfaction and beyond a reasonable doubt.

The term "reasonable doubt" as used in these instructions, does not mean a mere possible, imaginary or conjectural doubt, but an actual, substantial doubt of the defendant's guilt arising from the evidence, or from a lack of evidence, in the case.

A reasonable doubt is that state of the case, which, after a full and fair consideration of all the evidence, both for the United States and for the defendant, leaves your minds in that condition that you cannot say that you feel an abiding conviction, amounting to a moral certainty, that the defendant is guilty. If you have such reasonable doubt as to the defendant's guilt you must acquit him; for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the charge against the defendant is more likely to be true than the contrary; but the evidence must establish the truth of the charge to a reasonable and moral certainty, a certainty that convinces and directs your understanding, and satisfies your reason and judgment, you being bound to act conscientiously upon such evidence. This we take to be proof beyond a reasonable doubt. If upon such proof you can say that you feel an abiding conviction, amounting to a moral certainty, that the defendant is guilty as

charged, then you are satisfied beyond a reasonable doubt, and you should convict him.

(Sgd.) J. T. DeBOLT,
Judge. [59]

In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA

vs.

LEE CHOY,

Defendant.

Defendant's Requested Instructions. [60]

2. INSTRUCTION No. 5.

I direct you, Gentlemen of the Jury, that you shall find the defendant not guilty of the offense charged in Count One of the Indictment.

Refused (Sgd.) J. T. D. [61]

3. INSTRUCTION No. 6.

I direct you, Gentlemen of the Jury, that you should find the defendant not guilty of the offense charged in Count Two of the Indictment.

Refused (Sgd.) J. T. D. [62]

4. INSTRUCTION No. 9.

The Court instructs the jury that the defendant at the outset of the trial is presumed to be an innocent man. He is not required to prove himself innocent or to put in any evidence at all upon that subject. In considering the testimony in the case, you must look at that testimony and view it in

the light of that presumption which the law clothes the defendant with, that he is innocent, and it is a presumption that abides with him throughout the trial of the case until the evidence convinces you to the contrary beyond all reasonable doubt.

Refused (Sgd.) J. T. D.

(Branson—Sec. 376—Pgs. 397–8.) [63]

5. INSTRUCTION No. 8.

I instruct you, Gentlemen of the Jury, that the indictment preferring this charge against the defendant is no evidence whatever of his guilt; it is simply an accusation or charge; and no juror should suffer himself to be influenced in the slightest degree by the fact that this indictment has been returned against the defendant.

(Sackett—Vol. 2—Pg. 1651.)

Refused (Sgd.) J. T. D. [64]

INSTRUCTION No. 41.

6.

The law presumes every man to be innocent, and in this case the burden of proof is upon the United States, and, to entitle it to a conviction of the defendant, the United States must prove every material element of the offense charged to your satisfaction beyond a reasonable doubt, and to the satisfaction of each member of the jury.

The prisoner at the bar is presumed to be innocent until he is proven to be guilty. He is not required to prove his innocence, but may rest upon the presumption in his favor until it is overthrown by positive, affirmative proof. The burden is therefore on the United States to establish to your satisfac-

tion, beyond any reasonable doubt, the guilt of the prisoner as to the crime charged in this indictment. If you entertain any reasonable doubt as to any fact or element necessary to constitute the prisoner's guilt, it is your sworn duty to give him the benefit of the doubt and return a verdict of acquittal. And even where the evidence demonstrates probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the prisoner.

(Sackett—Vol. 2.—Pg. 1596.)

Refused (Sgd.) J. T. D. [65]

7. INSTRUCTION No. 42.

The only foundation of a verdict of guilty in this case is that the entire jury shall believe from the evidence, beyond a reasonable doubt and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence, and every reasonable doubt of his guilt; and if the prosecution has failed to furnish such measure of proof, and to so impress the minds of the jury of his guilt, they should find him not guilty.

(Sackett—Vol. 2.—Pg. 1740.)

Refused (Sgd.) J. T. D. [66]

8. INSTRUCTION No. 43.

The Court instructs the jury, that before they can convict the defendant in this case, it must appear, from the evidence, beyond a reasonable doubt, that the defendant, and not somebody else, committed the offense charged in the indictment. It is not sufficient that the evidence shows that the defendant

or somebody else committed the crime, nor that the probabilities are that the defendant and not somebody else committed the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendant or someone else is the guilty party.

(Seckett—Vol. 2.—Pgs. 1585 and 1586.)

Refused (Sgd.) J. T. D. [67]

9. INSTRUCTION No. 44.

The Court instructs the jury that the defense in this case is what is known in law as an “alibi”; that is, that the defendant was not present at the time and place of the commission of the offense charged in the indictment, if any such offense has been committed, but that he was at that time at another and different place. As to this defense, you are instructed that it is not necessary for the defendant to prove an alibi to your satisfaction, beyond a reasonable doubt, nor by a preponderance of the testimony, but if, after a full and fair consideration of all the facts and circumstances in evidence, you entertain a reasonable doubt as to whether or not the defendant was present at the time and place of the commission of the offense charged in the indictment, if such offense has been committed by anyone, it will be your duty to give the defendant the benefit of such doubt and acquit him.

(Branson—Sec. 371—Pg. 390-1.)

Refused (Sgd.) J. T. D. [68]

10. INSTRUCTION No. 45.

You are further instructed that you are the sole judges of the credibility that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because the witness has stated it to be so, provided you believe from all the evidence that such witness is mistaken or has knowingly testified falsely as to that fact.

Refused (Sgd.) J. T. D. [69]

11. INSTRUCTION No. 46.

You are instructed that the law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an innocent man, not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted that the evidence must overcome the legal presumption of innocence, and in order to overcome the legal presumption as I have already stated, the evidence must be clear and convincing and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty. A reasonable doubt is an actual doubt that you are conscious of having after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such doubt as you are conscious of having, that is a rea-

sonable doubt, of which the defendant is entitled to have the benefit, and you must acquit him.

Holt vs. U. S., 218 U. S. 245.

Refused (Sgd.) J. T. D. [70]

12. INSTRUCTION No. 47.

In considering the evidence if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, it is your duty under the law to do so and if you have a reasonable doubt of his guilt you should acquit him.

(Sackett—Vol. 2—Pg. 1739.)

Refused (Sgd.) J. T. D. [71]

13. INSTRUCTION No. 10.

The jury are further instructed that the presumption of innocence is not a mere form, to be discharged by the jury at pleasure, but is an essential, substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit the defendant, unless the evidence in the case convinces them of his guilt as charged, beyond all reasonable doubt.

(Sackett—Vol. 2—Pg. 1694.)

Refused (Sgd.) J. T. D. [72]

12. INSTRUCTION No. 12.

The Court instructs the jury that certain police officers and detectives have testified in this case on behalf of the United States, and that, under the law, in weighing their testimony greater care should be

used, because of the natural unavoidable tendency of such persons in procuring and stating evidence against the accused.

(Sackett—Vol. 2—Pg. 1771.)

Refused (Sgd.) J. T. D. [73]

15. INSTRUCTION No. 13.

The testimony of detectives and informers, whose business it is to secure evidence, should be examined and weighed with greater care than that of witnesses wholly disinterested.

(Hughes—Sec. 224—Pg. 216.)

Refused (Sgd.) J. T. D. [74]

16. INSTRUCTION No. 14.

If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty.

(Hughes—Sec. 301—Pg. 299.)

Refused (Sgd.) J. T. D. [75]

17. INSTRUCTION No. 15.

Each juror must be satisfied beyond a reasonable doubt that the defendant is guilty as charged, before he can, under his oath, consent to a verdict of conviction. If any one of the jurors, after having duly considered all the evidence, and after having consulted with his fellow-jurymen, entertains such

reasonable doubt, the jury cannot, in such case, find the defendant guilty.

(Hughes—Sec. 301—Pg. 299.)

Refused (Sgd.) J. T. D. [76]

18. INSTRUCTION No. 16.

The Court instructs the jury that it is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant. They must exclude to a moral certainty every other reasonable hypothesis.

Refused (Sgd.) J. T. D. [77]

19. INSTRUCTION No. 17.

You are further instructed that the presumption of law is in favor of the innocence of the defendant, until his guilt is established, by the evidence to the satisfaction of the jury beyond a reasonable doubt; and if, upon full consideration of all the facts and circumstances in evidence, you entertain a reasonable doubt of his guilt, you should give him the benefit of it and acquit him. It is difficult to define in exact terms the nature of a reasonable doubt. It may be said to arise from a mental operation and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge or the occurrence of a particular event, or the existence of a thing. It is a matter that must be determined by the jury, acting under the obligations of their oaths and their sense of right and duty. If, from an examination and consideration of all the facts and circumstances in evidence taken in connection with the charge of the Court, you are not satisfied

beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you will return a verdict of acquittal.

U. S. vs. Ybanez, 53 Fed. Rep. 536.

Refused (Sgd.) J. T. D. [78]

20. INSTRUCTION No. 48.

The Court further instructs you, Gentlemen of the Jury, that the defendant has interposed in this case the defense of what is known in law as an alibi; that is, as he claims, that he was at another place at the time of the commission of the alleged crime, and therefore was not, and could not have been, the person who committed the crime charged. All the evidence should be carefully considered by you, and, if the evidence on this subject, considered and compared with all the other evidence in the case, is sufficient to raise in your minds a reasonable doubt as to the guilt of the defendant, you should acquit him.

The defendant is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of evidence. It is sufficient to justify an acquittal if the evidence upon that question raises in your minds a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed. And you will understand, also, that the attempt of the defendant to prove an alibi does not shift the burden of proof from the prosecution, but that the prosecution is bound to prove beyond a reasonable doubt

that the defendant was present at the place of the alleged crime at the time of its commission.

Branson's Instructions to Juries, Sec. 371;

Glover vs. U. S., 8 Ann. Case. 1185 and note;

8 R. C. L. p. 224;

16 C. J. 558.

Refused (Sgd.) J. T. D. [79]

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Two tins Opium, Exhibits "A" and "B" for Govt....pg.	3
Jacket and 18 tins, Exhibit "C" for Govt.....pg.	87
Drawing, Defendant's Exhibit "1".....pg.	157
[80]	

In the District Court of the United States, in and
for the District and Territory of Hawaii.

No. 3259.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

Transcript of Testimony.

Transcript of testimony taken in the above-entitled matter, before the Honorable J. T. DeBOLT, one of the judges of the aforesaid District Court, and a Jury, at the Federal Court Room, Honolulu, T. H., on Monday, November 6th, 1922, at 9 o'clock A. M.

FRED PATERSON, Esq., Assistant United States Attorney, representing the Government, and

BARRY S. ULRICH, Esq., of the firm of Messrs. THOMPSON, CATHCART & ULRICH,

representing the defendant. The defendant was also present in person.

R. N. Linn, shorthand reporter.

WHEREUPON, the following proceedings were had and done and testimony taken, to wit:

(A jury was duly called, impaneled and sworn to try the case.)

The COURT.—All witnesses, except the one on the stand, will remain outside of the courtroom during the progress of the trial. [81—1]

Testimony of M. B. Bairos, for the Government.

M. B. BAIROS was duly called and sworn as a witness for the prosecution, and testified as follows:

Direct Examination.

(By Mr. PATTERSON.)

Q. State your name, please.

A. M. B. Bairos.

Q. I ask you to open this package (indicating package). I will assist you in opening it. (Package opened.) Have you seen this package before?

A. I have.

Q. Where did you see it?

A. At the office of the narcotic agents; Mr. Wells' office.

Q. That was downstairs here in the Federal Building? A. Yes, Federal Building.

Q. And you positively identify this coat?

A. Yes, I marked it here with my initials,—different places.

Mr. PATTERSON.—Mr. Ulrich, you will admit

(Testimony of M. B. Bairos.)

Mr. Bairos' qualifications as a chemist? You know that he is.

The COURT.—He has testified before here as an expert.

Mr. ULRICH.—I will admit he is a chemical expert and has some knowledge of opium, for the purpose of qualifying him to say if it is opium.

Q. Did you examine any of these cans?

A. Yes, I examined two of these cans. There is one of them and here is the other. (Witness picks out two of the tins from the package.)

Q. Now, who were these tins personally delivered to you by? [82—2]

A. By Mr. Wells.

Q. Who sits here?

A. Narcotic agent. Yes, he opened up this bag and I took at random two of these tins. I picked up two cans at random.

Q. These two cans now in your hand? A. Yes.

Q. Did you make any examination of the contents of these cans?

A. I examined them physically and chemically.

Q. What is the contents of these tins?

A. Why, smoking opium.

Q. You are positive of that?

A. I am positive it is smoking opium.

Mr. PATTERSON.—I would ask at this time that these two cans of opium be received in evidence and marked United States Exhibits "A" and "B" respectively.

Mr. ULRICH.—No objection.

(Testimony of M. B. Bairos.)

The COURT.—They will be received and so marked.

(Two tins received and marked respectively Government's Exhibit "A" and "B.")

The COURT.—As I understand you, you took these two tins out at random?

A. At random. I shut my eyes and picked out these two tins.

Q. That is they contain smoking opium which is a narcotic, Mr. Bairos? A. Yes.

Q. After you had examined these cans what did you do with them? [83—3]

A. I returned them to Mr. Wells, narcotic agent Mr. Wells, in his presence, and saw them put back in this package and sealed.

Q. When you first interviewed Mr. Wells was the package sealed?

A. The package was sealed.

Q. Did he open it in your presence?

A. He opened it in my presence, broke the seals in my presence, and I took the sample as I said before, at random from this jacket.

Q. And then after you had conducted this examination you returned the two cans?

A. I did personally.

Q. Were they in your custody all the time?

A. They were.

Q. Did Mr. Wells receive them, put them back in this jacket? A. He did.

Q. And seal them up, seal the package up again?

(Testimony of M. B. Bairos.)

A. In my presence, under the same conditions as I explained in Court this morning.

Cross-examination.

(By Mr. ULRICH.)

Q. Mr. Bairos, you said you got these from Mr. Wells?

A. Picked them from the package in the presence of Mr. Wells.

Q. You took these two tins and opened them?

A. Yes.

Q. You made no examination of the rest of them, they appeared to be the same?

A. I did not. [84—4]

Q. What kind of opium is that?

A. Smoking opium; prepared smoking opium.

Q. Is it the usual kind of smoking opium that you are most familiar with?

A. Yes, sir; as far as I could see, yes.

Q. Does it spoil the product to open it up, keep it open? A. No.

Q. You are sure these are the same two tins that you opened? A. I am.

(Witness excused.)

(Thereupon an adjournment was taken until 9 o'clock A. M. Wednesday, November 8, 1922.) [85—5]

On Wednesday, November 8th, 1922, at 9 o'clock A. M., all parties being present in court as before, the following further proceedings were had and done and testimony taken:

(Jury all present.)

Testimony of Eunice C. Alapa, for the Government.

EUNICE C. ALAPA was duly called and sworn as a witness for the prosecution, and testified as follows:

Direct Examination.

(By Mr. PATTERSON.)

Q. What is your full name?

A. Eunice C. Alapa.

Q. Where do you live? A. Quong Tong Lane.

Q. In Honolulu? A. In Honolulu.

Q. How long have you been living in Honolulu?

A. One year the 10th of October.

Q. Do you know the defendant? A. Yes.

Q. What is his name? A. Lee Choy.

Q. And about how long have you known him, Mrs. Alapa?

A. A little over two weeks before the night of the 18th.

Q. The 18th of October you are speaking of?

A. October, yes.

Q. When did you first meet him? Just state the occasion when you first met him this time, two weeks prior?

The COURT.—Occasion, circumstances. [86—6]

A. He drove to my house in Kamihara's car. He drove to my house in Kamihara's car and I think they stopped the machine in front of my house. I heard the machine stop, and so pulling the curtain aside,—I walked to the veranda to see who it was and Lee Choy got out of the machine and instructed

(Testimony of Eunice C. Alapa.)

the driver to turn the car. I talked to this gentleman on the verandah. He told me he wanted to see me on business. I asked him what kind of business. He didn't say anything then for a few minutes, and he said, "Can I come in the house?" and I said, "Why, no, if you want to see me I will go out." We took a ride in the machine. At first, before we went riding, he said that he had a little business to attend to and he would send the car back after me. I went in and dressed and he went away with the chauffeur, and in about 15 minutes the chauffeur came back and I asked the chauffeur where he was and he said, "Down Nuuanu Street," and we drove down Nuuanu Street, turned into some lane—the name of the lane I do not know,—and after we had turned into the lane we waited for several minutes and I did not see Lee Choy and I told the driver to blow the horn, and he blew the horn about three times, and just as we were ready to leave he came out, got in the machine with me, and after he got in the machine we went out for a ride. It was then he told me what he wanted to see me for.

Q. What did he want to see you for?

A. He wanted to see me, wanted me to meet steamers and take opium off of them.

Q. Did he mention any steamers? [87-7]

A. Yes, "President Wilson, "President Lincoln," and all the President steamers.

Q. Did he say where this opium was coming from? A. From China.

(Testimony of Eunice C. Alapa.)

Q. Did he have any particular reason that he had chosen you for this employment?

A. He said that he had had a woman smuggle for him before and that she had left, and he was looking for another woman.

Q. Did he say why he wanted a woman?

Mr. ULRICH.—Object to the question, if the Court please. Any suggestion that he said this or that. He could ask for everything that he said on this occasion.

The COURT.—She answered he said he wanted a woman. Perhaps that is a little better way.

Mr. PATTERSON.—I will withdraw the question.

The COURT.—Usually that is the better practice.

Q. Mrs. Alapa, you said, you testified, that he said that he wanted a woman. Was there anything else said?

A. Well, yes, there was something else said. I asked him why and he said because they could get away with it better; they did not examine women coming off the steamers.

Q. He said they did not examine them coming off the steamers? A. Yes.

Q. You say this was two weeks prior to the 18th of October? A. Yes.

Q. And was there anything else said that night?

A. Yes, there was something else said.

Q. What else was said? [88-8]

A. Well he told me that he had been having

(Testimony of Eunice C. Alapa.)

opium coming in on these steamers, and that he wanted me to go there and smuggle. I told him I did not want—

The COURT.—A little louder.

A. He asked me to go to the steamers and smuggle. I told him I did not like to do that kind of thing, I had never did it. I told him I could not get on the steamers and he said yes, go right on the steamers, they would ask me if I was a passenger and I was to say that I was.

Q. Was anything else said?

A. I asked him when the steamers would be in, and he said in about two weeks.

Q. Then where did you go,—what did you do?

A. I went home.

Q. Did he take you home in the car?

A. He drove in the same car with me until we got to the lane, Nuuanu Street, and I had the driver stop the car, and I walked in to my house. I didn't have the car drive in.

Q. Did you see Lee Choy after that?

A. Not until the night of the 18th.

Q. The night of the 18th of October? A. Yes.

Q. Where did you see him on this particular night? A. He came to my house.

Q. Quong Tong Lane? A. Yes.

Q. About what time of the night?

A. About 9:40 or a quarter to ten. [89-9]

Q. And did he come in the house?

A. Yes, he came in the house.

Q. And what did he have to say this time?

(Testimony of Eunice C. Alapa.)

A. He came in and said he was working. I asked him what kind of work, and he said the steamer was in, that he wanted me to go to the steamer.

Q. Was there anything else said?

A. Yes, he said that he would give me \$300 for two trips, and that two trips would have to be made before 11 o'clock.

Q. Was there anything else said?

A. Yes, I told him again that I didn't think I could get on the steamer, and he said he would go ahead and tell them, and that the inspector would ask me if I was a passenger, and I was to say that I was, and when I came off the steamer that they would not examine me.

Q. He told you they would not examine you?

A. He did.

Q. What did you do then, Mrs. Alapa?

A. I did not go right at once. I thought it over and I finally dressed and I went.

Q. You finally dressed and went? A. Yes.

Q. How did you get down to the steamer?

A. In Hara's, Kamihara's car.

Q. Where did you ride?

A. In the back seat with Lee Choy.

Q. Was there anybody else in there besides Lee Choy, Kamihara the driver, and yourself? [90-10]

A. No, sir; there was not.

Q. Where did you go? A. To pier 7.

Q. Pier 7, that is along down here on the waterfront?

(Testimony of Eunice C. Alapa.)

A. To pier 7, where the "President Wilson" was docked.

Q. That is the waterfront of Honolulu harbor?

A. Yes.

Q. As you arrived at the steamer was there anything took place?

A. Before we arrived at the point the car stopped and Lee Choy got off the car and went ahead of me, told the driver to stop the car, at the point he stopped at, and told me to follow in two or three minutes, that he would go on the steamer ahead of me.

Q. You say he jumped off before the car stopped?

A. Yes.

Q. Did you notice where he went?

A. He went to pier 7, toward that pier.

Q. And then a few minutes afterward the car stopped and you got out? A. Yes.

Q. Where did you go to?

A. I went up pier 7 to the steamer.

Q. Did you go on the steamer? A. I did.

Q. Did you have any difficulty getting on?

A. The customs inspector asked me if I was a passenger and I told him that I was.

Q. What happened then?

A. He did not say anything. I walked toward the steamer. [91-11]

Q. What happened then when you got on the steamer?

A. When I got on the steamer, Lee Choy was at the head of the gang-plank waiting for me and

(Testimony of Eunice C. Alapa.)

told me to follow him, which I did. He took me to the room where the opium was. The opium was not in the room,—but to the room where they put it on.

Q. Where was this room?

A. Well, it was in the bottom of the steamer some place. It appeared to be a stateroom of the cooks and waiters, I believe, of the Chinese.

Q. And after you arrived in this room what happened?

A. I arrived in the room, there was two or three Chinese in there, and they talked in Chinese. Well, Lee Choy was there, in there, and finally somebody brought a coat with opium in it, and I unbuttoned the top of my dress and slipped it down. He held the jacket. I put my arms in the jacket and tied it on.

Q. Who held the jacket? A. Lee Choy.

Q. The defendant who sits here with counsel?

A. Yes.

Q. You put these,—this smuggler's coat on?

A. Yes, I put it on.

Q. Did Lee Choy say anything?

A. He told me to hurry up.

Q. What did you do then?

A. I slipped my dress on and buttoned it. He told me there would be Chinese, Chinese to take me back to the gang-plank, and when I left there was a Chinese standing there who started to walk and I followed him and left [92-12] the steamer.

Q. Did you go down the gang-plank? A. Yes.

(Testimony of Eunice C. Alapa.)

Q. Where did you go from there?

A. Off the pier to Kawihara's car.

Q. When you arrived at the car what did you do?

A. When I arrived at the car I got in the car and waited for Lee Choy.

Q. How long did you wait?

A. About three or four minutes.

Q. Just a short space?

A. Just a very short time.

Q. Did Lee Choy come? A. He did.

Q. What did he do?

A. Got in the same car with me and instructed the driver where to go.

Q. Did which?

A. Got in the same car with me and instructed the driver where to take the car.

Q. Where did you go from there?

A. Well, I don't know the name of the place.

Q. You don't know the name of the place. It was some place in Honolulu?

A. Yes, it was in Honolulu.

Q. The three of you, that is the driver, Lee Choy and yourself went to this particular place?

A. Yes.

Q. When you arrived at this place what happened?

A. He instructed the driver where to drive the car, and [93—13] the driver followed instructions, and he finally told him to stop the car, and when the driver brought the car to a stop he and I, Lee Choy and I, got out of the car and went to a

(Testimony of Eunice C. Alapa.)

Chinese house, and that is where we left the opium.

Q. What did you do when you got inside of the house?

A. When I got inside of the house I saw a Chinese lady, and I unbuttoned my dress and took off the opium and laid it on a little stand that was in the center of the room, and Lee Choy picked up the opium and laid it over in the chair, and he and the Chinese woman talked in Chinese, and I got it was about a tin of opium, there was one tin missing, so he said, 19 tins in the first trip.

Q. After this what happened, Mrs. Alapa?

A. After this I told him I did not think we had better go back, and he said yes, it was nearly 11 o'clock, they changed custom inspectors at 11, we should go back right away and make one more trip, and we got in the machine and went back to pier 7.

Q. When you arrived at pier 7 what did you do?

A. Before we arrived to the pier he got off the car as he did the first time, and went on the steamer ahead of me, and I followed in a few minutes after him, and he was waiting at the head of the gang-plank, the same as he was before.

Q. You went back in the same car?

A. Yes, the same car.

Q. Kamihara drove again? A. Yes. [94—14]

Q. Do you know this man Kamihara? A. Yes.

Q. Is this the man? (Indicating man who entered courtroom.) A. Yes, sir.

(Testimony of Eunice C. Alapa.)

Q. You drove back. That is the man you made the first trip with? A. Yes.

Q. He was the driver all the time?

A. Yes, he was the driver all the time.

Q. And the second trip you say you were back to the pier, were you, that night? You just arrived back to the pier, in your testimony.

A. Before we got to the pier Lee Choy got off the machine as he did the first time, and went ahead of me, told me to wait two or three minutes and then follow him.

Q. And when he got off did you notice where he went to? A. Went to pier 7.

Q. What did you do?

A. Stayed in the machine two or three minutes, and then I went to pier 7.

Q. Did you follow him?

A. I followed him.

Q. Where did you go?

A. I went on the gang-plank. The custom's inspector did not say anything to me the second time, and I walked right on the steamer and met him at the head of the gang-plank as I did before, Lee Choy.

Q. What did he say?

A. I followed him as I did before, this time going [95—15] to the first-class passenger's room.

Q. What happened when you arrived in this room?

A. When I arrived at the stateroom we went in

(Testimony of Eunice C. Alapa.)

the stateroom and sat down and in a little while the Chinese brought the opium to the stateroom.

Q. You went into this first-class passenger's stateroom? A. Yes, sir.

Q. Who was in there? A. Nobody.

Q. After you had— Did you see Lee Choy on this second trip?

A. Lee Choy was with me.

Q. You went into the stateroom together?

A. Yes, we went into the stateroom together.

Q. What happened after you got inside of the stateroom?

A. It was very hot in the stateroom, and he turned on the fan and sat down for awhile.

Q. Then what happened?

A. Then some Chinese brought the opium.

Q. How was this opium brought, Mrs. Alapa?

A. It was brought in a kind of a vest made of some kind of white material, had pockets in it, tied in the front with little strings.

Q. You see this vest. I will ask you whether or not you recognize it?

A. It looks like the same vest.

The COURT.—How is that? [96—16]

A. It looks like the same vest.

Q. It looks like the same vest that was put on you on this particular night? A. Yes.

Q. Who put it on? A. Lee Choy.

Q. Did he have it in his hands?

A. He held it in his hands like that, and I slipped my arms over it.

(Testimony of Eunice C. Alapa.)

Mr. PATTERSON.—I ask that this vest, together with the 18 tins of opium, be received in evidence.

Mr. ULRICH.—I am not sure she identified it.

The COURT.—Did you observe any marks?

A. It had the same kind of stamp on it. Well, the second trip I had a different vest.

Mr. PATTERSON.—I ask that it be marked for identification, if your Honor please.

The COURT.—You did not have the same vest the second time as you did the first time?

A. No, but they were not made the same.

Q. You say that Lee Choy put this vest on you?

A. He held the vest up like you did here, and put my arms in it.

Q. What happened then, Mrs. Alapa?

A. The second time?

Q. After you had the vest on.

A. After I put my arms in and tied it and put my dress on, put my dress back.

Q. Did you have a cape that night?

A. Yes, I did. [97—17]

The COURT.—Have you that cape with you?

A. No.

Q. Have you it at home? A. Yes.

Q. Will you produce it in court? A. Yes.

The COURT.—The jury ought to be able to see the facts as nearly as possible as they occurred.

Q. After you had the jacket tied then what happened?

A. I followed a different Chinese that time to the gang-plank. Lee Choy told me to leave, and he

(Testimony of Eunice C. Alapa.)

would get in the machine in a few minutes, he would be out, so when I opened the door I saw a Chinese standing there, so he started walking and I followed him, followed him to the gang-plank and he remained on the steamer and I left, and when I came off the second time is when I was arrested.

Q. You came down the gang-plank. Where did you go after you got off the gang-plank?

A. The second time? A. Yes.

A. I was arrested. After I left the pier, pier 7, to the street, I was arrested.

Q. Do you know who arrested you?

A. Mr. Stevenson.

Q. Now, state just what occurred when you first saw Mr. Stevenson that night?

A. Well, when I came off the pier to the street I was stopped by three or four gentlemen, Mr. McDuffie, Mr. Stevenson and Mr. Wells, and another gentleman, I do not know his name, and they asked me if I had any liquor on [98—18] me and I told them no, and they asked me what else I had on me and I did not answer, and then they arrested me, and they said they would take me to the police station, and also the driver of the machine, Kami-hara.

Q. They took the two of you to the police station?

A. They did.

Q. This was before you arrived at the automobile, was it?

A. Yes, they arrested me on the street.

(Testimony of Eunice C. Alapa.)

Q. What did they do after they arrested you?

A. They arrested me and drove me to the police station and took me to a room and brought the matron in and took the opium off of me.

Q. Who did you sit by in the car?

A. By Mr. McDuffie and that other gentleman, I do not know his name, tall, slender gentleman, I don't know what his name is.

Q. Was there any conversation about opium?

A. Yes, there was a conversation about opium.

Mr. ULRICH.—I object to that.

Q. Was there any conversation took place—

Mr. ULRICH.—Objected to.

The COURT.—Any conversation which he may have had with anybody in the defendant's presence would be evidence.

Mr. PATTERSON.—This was merely developing how this opium was discovered by the officers for the purpose of identifying the opium more than anything else.

(Argument.)

(Objection sustained.)

Q. Who took this opium off? [99—19]

A. The matron at the police station.

Q. Did you see it delivered to anyone by her?

A. Why, after she took it off of me I think some of the officers picked it up. I don't know what they did with it.

Q. Did you see them pick it up?

A. No, sir, I did not. I left the room as soon as she took it.

(Testimony of Eunice C. Alapa.)

Q. You left the room as soon as she took it off of you? A. Yes.

Q. And you were placed under arrest then, were you?

A. I was placed under arrest at the street in front of the pier.

Q. Did you see this opium afterwards?

A. I saw it when the officers brought it to your office.

Q. Did you recognize it in there, in my office?

A. Yes.

Q. You recognized it as being the same jacket, the same opium? A. Yes.

Q. Did you have any further experience after you arrived? After you got in this automobile that night what happened, Mrs. Alapa?

A. Before we went to the police station?

Q. Yes.

A. They took me to the police station, took the opium off of me, and after I had taken the opium off they asked me what I had done with the first load, I took off the stuff, where I had taken it, and I told them I could not tell them. [100—20]

Mr. ULRICH.—I object to any conversation that took place between this witness and McDuffie.

The WITNESS.—They asked me what I had done with the first trip.

The COURT.—I suppose nothing more could follow, just repeating her story.

Mr. PATTERSON.—I want to show that sub-

(Testimony of Eunice C. Alapa.)

sequently the woman and the officers were out to the place where the first opium was taken.

Mr. ULRICH.—I am objecting to any conversation. She could have told all kinds of stories to McDuffie about where the opium might be found. Perhaps it was found; perhaps it was not found. The only thing we are interested in is what actually happened; cannot go into a conversation.

The COURT.—I am inclined to feel that any conversation with this woman, that this witness may have had with others in the absence of the defendant is objectionable.

Q. You got in this automobile with McDuffie, and Inspector Stevenson, is that correct?

A. And Inspector Wells.

Q. He was there also?

A. And the other gentleman, that I do not know his name. I believe he is a prohibition man.

Q. The second gentleman? (Indicating.)

A. Mr. Stevenson was along too.

Q. Mr. Wells? A. Yes.

Q. And another man?

A. Mr. Stevenson, Mr. Wells and the gentleman on this side. [101—21]

Q. (Addressing man standing in doorway.) Your name is Mr. Wrinckel?

Mr. WRINCKEL.—Yes.

Q. That is the gentleman who just spoke?

A. Yes.

Q. You say you went to the police station, is that correct, with these three gentlemen and McDuffie?

(Testimony of Eunice C. Alapa.)

A. Yes.

Q. Were you in an automobile?

A. I was in Hara's automobile.

Q. Who else was in Hara's automobile?

A. Well, when I first got in the machine Mr. Stevenson was alongside of me and he felt the opium on me, and he says, "She is loaded with it" and they took me to the police station. I don't remember if it was Mr. McDuffie sat on the other side of me or Mr. Wells. It was one of them.

Q. After you got to the police station where did you go?

A. After the matron had taken the opium from me they asked me to take them to the place where I took the first load of opium. I told them I didn't know the name of the place, or the street, and they told the chauffeur to drive them where he had stopped and I went with them, and identified the house that I had left the opium.

Q. From there where did you go?

A. They searched the house and could not find the opium and then we went back to the police station. [102—22]

Q. Was there anything happened on the way to the police station? A. Yes.

Q. What was it?

A. Lee Choy was in a car with another Chinese and some chauffeur driving and his car passed our car and I identified him and they stopped his car.

Q. They stopped Lee Choy's car? A. Yes.

Q. And what happened then?

(Testimony of Eunice C. Alapa.)

A. The other Chinese that was in the car with Lee Choy got out of the machine and held a conversation with McDuffie on the street; and then I think it was Mr. Wells brought Lee Choy out of that car to the car I was in, and asked me if that was the man and I said, "Yes."

Q. Were you positive that that was the same man? A. Yes.

Q. You are positive it is the same man that sits here to-day? A. Yes.

Q. Then what happened?

A. They put him in the machine with me, Lee Choy, and then Mr. McDuffie got in the back with us and we went to the police station.

Q. McDuffie was in the back?

A. Yes, McDuffie was in the back seat.

Q. After you arrived at the police station what happened?

A. Well, after we arrived at the police station they put Lee Choy and the driver in jail and someone released them. I don't know who it was. I think Mr. Carden telephoned to Mr. Brown first, and I believe [103—23] Mr. McDuffie talked to Mr. Brown, attorney Brown, and then the Chinese, that was in the car with Lee Choy, he also talked to Mr. Brown.

Q. Do you know that Chinese?

A. Why I think I could identify him. I am not positive. I had never seen him before.

Q. You think you could identify him? A. Yes.

Q. A Chinaman talked to Brown?

(Testimony of Eunice C. Alapa.)

A. This Chinese we had in the car with Lee Choy talked to Brown in the police station, and talked to—

Q. Talked to McDuffie also? A. Yes.

Q. He was in the car with Lee Choy when you identified Lee Choy? A. This other Chinese?

Q. Yes? A. Yes.

Q. Who was driving that car, a Chinaman or Japanese? A. Japanese.

Q. You believe it was a Japanese. And do you know Mr. Brown?

A. I met Mr. Brown for the first time at his office at 8:30 the next morning, the morning of the 19th.

Q. Who told you to go there?

Mr. ULRICH.—That is objected to. What Difference could it make who told her to go there.

A. This Chinese.

The COURT.—I think the answer might be subject to a motion to strike. If she should say Lee

Choy it is [104—23] material. The question is proper. I think the answer might be subject to a motion to strike. The objection will be overruled.

Mr. ULRICH.—Exception.

The COURT.—Exception allowed.

A. The Chinese that was in the car with Lee Choy.

Mr. ULRICH.—I move to strike that. I do not know anything about the Chinaman around the police station there.

Mr. PATTERSON.—I want to show by this

(Testimony of Eunice C. Alapa.)

witness that Lee Choy and herself were both represented by Mr. Brown the next morning, Mr. Ching Tai sent her there.

The COURT.—How is the defendant responsible for what this other Chinese said, although they happened to be in the same car together. If she had said Lee Choy it was material and proper. The motion to strike will be granted and the jury will disregard the answer. There is one further suggestion, Mr. Patterson, if this other Chinaman suggested that in the presence of Lee Choy, if it was in his presence, it has a different phase.

Q. Did this all happen in the city and county of Honolulu, Territory of Hawaii? A. Yes.

Q. All these things you have related down there?

A. Everything that I related.

Q. You say this was on the night of the 18th of October of this year? A. Yes.

Q. Who do you live with, Mrs. Alapa?

A. My husband's grandmother.

Q. That is the old lady who sits here with you this [105—24] morning? A. Yes, sir.

Cross-examination.

(By Mr. ULRICH.)

Q. Mrs. Alapa, you say you have lived in Hawaii about a year and a half?

A. Yes, sir, about a year and a few days, the 10th day of October I was here one year.

Q. You are married? A. I am married, yes.

Q. Your husband is living here?

A. My husband is dead.

(Testimony of Eunice C. Alapa.)

Q. Before you lived here you lived where?

A. In the United States.

Q. On the coast, San Francisco?

A. No, in Oregon.

Q. Portland? A. No, Pendleton.

Q. And you have lived where you now live for how long? A. About four months.

Q. Where did you say that was?

A. Canton Lane.

Q. You live there with your husband's grandmother? A. Yes.

Q. You never saw Lee Choy say two weeks prior to that date of this occurrence you have told us about, is that right? A. I never did.

Q. On that occasion he called at your house?

A. Yes, sir. [106—25]

Q. And about what time of the day was it?

A. It was in the evening, around 8:30 I believe.

Q. Around 8:30 in the evening. I am going to ask you if you cannot place that date a little more definitely than about two weeks. Can you say on what day of the week it was?

A. I don't remember that. I remember it was about two weeks, because he said the steamer would be in in two weeks.

Q. That is the only way you have of saying it was about two weeks? A. Yes.

Q. You have no idea as to what day of the week it was?

A. I don't remember the day, or the exact date.

(Testimony of Eunice C. Alapa.)

Q. Had you known this driver who brought him to your house before this time? A. Yes, sir.

Q. What was his name? A. Kamihara.

Q. Had you used him to drive around town with before this?

A. I had him drive me for about eight months.

Q. So that you knew him quite well?

A. I knew him very well.

Q. When they went over there that evening was Lee Choy brought to you by this driver? That is, did the driver bring him in and say, "This is Mr. Lee Choy"? A. No, the driver did not.

Q. Did Lee Choy simply come into the house himself? I believe you said he did not come into the house. [107—26]

A. He did not come into my house; he came on the porch, the veranda.

Q. And rang the bell?

A. I heard the car stop, walked out on the veranda; heard the car stop and he came up to the veranda. All our conversation was on the veranda.

Q. And you knew him from that time, of course?

A. From that time.

Q. And knew him as Lee Choy?

A. I did not know his name.

Q. When did you first learn his name?

A. I learned his first name from him, but not his last.

Q. What is his first name? A. Lee.

Q. He told you his first name was Lee?

(Testimony of Eunice C. Alapa.)

A. Yes, and I found out his full name at the police station.

Q. You knew him before the time of your arrest simply as Lee? A. Yes.

Q. Did he tell you the name was Lee the first day he was there? A. No, he did not.

Q. When?

A. The night we were going to the steamer, that is when he told me his name was Lee.

Q. You asked him what his name was or he volunteered it? A. He said so.

Q. He said it was Lee? A. Yes.

Q. On this evening, 8:30 as near as you can remember [108—27] it, this man came on your porch and you and he had this conversation on your front veranda?

A. We did not have any conversation in regard to the opium on the veranda; we had a conversation in regard to going for a ride and talk some business, but I didn't know what the business was.

Q. But whatever the conversation was, was it had on your front veranda at 8:30 at night?

A. Yes.

Q. Is your house close to the street or is it back in the yard?

A. Right close to the street, right on the line.

Q. Now then he said to you that he wanted to talk business with you? A. He did.

Q. Did you ask him what the character of the business was that he wanted to talk to you?

A. I did.

(Testimony of Eunice C. Alapa.)

Q. And what did he say about that?

A. Well, he said he would go inside, and I said no, I did not let him in my house.

Q. Why didn't you let him in the house?

A. Because I didn't want to. I didn't know him, but I knew the driver.

Q. It was against your practice to allow men whom you did not know to come in your house?

A. Yes.

Q. Was your mother-in-law, your grandmother-in-law, at home at that time?

A. Yes, she was at home at that time. [109—28]

Q. Now, as I understand the substance of the conversation that was had at that time, was simply that he wanted to talk business with you and asked you to come in? A. And I said no.

Q. Would not let him in the house?

A. I would not let him in the house.

Q. Then he suggested, who suggested the ride?

A. He suggested.

Q. That you come and ride with him. Then what happened?

A. He told me that he had a little business to attend to before I would ride with him, and he told the driver to take him some place, I did not know where they went, went down Nuuanu Street, and in about 15 minutes,—in the meantime I dressed, in 15 minutes or so the driver came back and picked me up, and we drove down Nuuanu Street, and the driver turned down into a lane and I asked the driver where he was.

(Testimony of Eunice C. Alapa.)

Q. Do you know Mrs. Alapa who it was that sent him to you, or do you know of your own knowledge how it was that he came to you as a woman likely to be available for this smuggling?

A. No, I did not know that.

Q. You don't know whether the driver brought him there to you? A. No, I don't know.

Q. From your house then on this lane,—by the way where is that lane?

A. It is above School Street, the first lane to the right of Nuuanu.

Q. You drove over to Nuuanu Street? [110—29]

A. Yes.

Q. In which direction on Nuuanu Street?

A. When the driver came back after me?

Q. You are going on the trip now with the driver to meet Lee Choy?

A. We drove down Nuuanu Street, past School, and toward town.

Q. Toward town and turned into some lane?

A. Turned into some lane. I do not know the name of the lane.

Q. It was nearer town than Qwong Tong Lane?

A. Oh, yes; it was nearer to town.

Q. And below School Street? A. Yes.

Q. Do you know whether it was below Kukui Street or not?

A. I don't remember that, what the street was.

Q. The best of your recollection is it was?

The COURT.—It was a lane, and not a street?

(Testimony of Eunice C. Alapa.)

A. It was a lane, I think.

Q. Running into Nuuanu Street?

A. Running on the right-hand side, I believe, of Nuuanu Street.

The COURT.—Right-hand side coming down?

A. Coming down.

Q. You drove into this lane? A. Yes.

Q. This was about what time?

A. Well this was, I think it was about 8:30 he came to my house,—possibly somewhere around 9 o'clock.

Q. Just a short time? [111-30]

A. Just a short time.

Q. How far down this lane did you go before you stopped?

A. We drove into the lane quite a space in there, and lots of little houses in there, and the driver had stopped his car and we waited there.

Q. I am trying to find out how far you went into the lane off the main road?

A. I could not tell you just how far, quite—

Q. Some distance?

A. Quite a long lane in there.

Q. Some distance? A. Quite a distance.

Q. You stopped the car and waited? A. Yes.

Q. You waited so long you became impatient and asked the driver to blow the horn?

A. I thought it was a funny place to have me drive. I didn't like it, and wanted to go back home, and told the driver to blow a horn to see if he would come.

(Testimony of Eunice C. Alapa.)

Q. What kind of business did you imagine this man would have when he asked you to take a drive with him?

A. I didn't have any idea as to what kind of business.

Q. You blew the horn and the chauffeur blew the horn, and finally this man appeared?

A. He appeared.

Q. And got in the car with you? A. Yes.

Q. And you both sat in the back seat? A. Yes.

[112-31]

Q. And then you took a drive?

A. We took a drive.

Q. Do you know where you drove?

A. Drove out toward Waikiki and to some place, I think Kapiolani Park, and back.

Q. When Mr.—, who was the driver?

A. Kamihara.

Q. When the chauffeur came in and got you he did not say anything to you about this man, did he?

A. No, he did not. He just simply drove me.

Q. On this drive to Waikiki you had this conversation with Lee Choy? A. Yes.

Q. And he explained to you that he had,—that he wanted a woman to smuggle opium for him?

A. He did.

Q. Did he tell you how much it was going to pay the woman to smuggle opium for him?

A. He did not tell me that night.

(Testimony of Eunice C. Alapa.)

Q. He explained that these various Presidents were the boats that would be—

A. Yes, he did.

Q. And told you that a boat would be in in about two weeks? A. Yes.

Q. Did he explain how he would get the opium off the boat or anything of that sort, any of the details of the transaction?

A. He said that he had had a woman taking off the boat, [113-32] but he did not say how she took it off.

Q. This, I believe you said, was the first time you had anything to do with opium smuggling?

A. Yes, sir.

Q. As a result of the conversation you had with Lee Choy while driving out toward Waikiki that evening,—by the way, first I will ask you, did you see anybody else or talk to anybody else during that trip? A. No.

Q. No one?

The COURT.—This conversation between yourself and Lee Choy, was that sufficiently loud for the driver to hear you, to understand what you were saying? A. We were not talking loud.

The COURT.—You are pretty sure no one else, so far as you know, knew you were out driving with Lee Choy that night?

A. I am positive no one else heard our conversation.

The COURT.—Did he tell you where he lived?

A. He told me he lived at 13th Avenue, Kaimuki.

(Testimony of Eunice C. Alapa.)

The COURT.—Anything else?

A. But I found out afterwards he did not live there.

Q. Did he tell you anything else about his personal affairs?

A. He told me he had some relatives on Fort Street running a store.

Q. Did he tell you anything about what he was doing in this lane where you went to meet him?

A. No, he did not.

Q. He did not identify that as any particular place? [114-33] A. No.

Q. As a result of this conversation you had with Lee Choy in the automobile this night, did you or did you not arrive at a definite understanding that you would smuggle opium for him?

A. I decided that I would not.

Q. You told him so? A. Yes.

Q. So that the transaction was closed as far as you were concerned, and you came back? A. Yes.

Q. Did he drive you back to your house?

A. We drove up to Nuuanu Street and when the car came to the lane I asked the driver to stop, and I got out at Nuuanu and walked into the lane.

Q. Lee Choy went away with the driver?

A. Yes.

Q. Did you have a conversation with the driver that night? A. No.

Q. None at all?

A. He came and got me and took me away.

Q. Do you know anybody who knows Lee Choy?

(Testimony of Eunice C. Alapa.)

Have you ever heard of Lee Choy before this night? A. Never have.

Q. Don't you know anything about him?

A. Didn't know anything about him.

Q. You only knew the driver from having ridden with him for several months?

A. I knew the driver. [115-34]

Q. That was two weeks before the 18th, as near as you can place it? A. Yes.

Q. You didn't see Lee Choy between that time and the time this occurrence took place, or did you?

A. I never saw him or heard from him until the night of the 18th, two weeks later.

Q. Do you remember how Lee Choy was dressed the night you saw him first?

A. He had on white sport shirt, open in the neck.

Q. A white sport shirt open in the neck?

A. Yes, one with short sleeves and opened in the neck, some kind of khaki pants, looked like they had been washed, bleached out.

The COURT.—Had no coat?

A. Had no coat on. Looked real white at night, the pants, under the lights looked almost white. I think they were khaki.

Q. Long trousers or did he have leggings?

A. I don't think he had any leggings on.

Q. Did he have a hat on?

A. Yes, he had a hat on.

Q. A straw hat?

A. I don't know what kind of a hat.

(Testimony of Eunice C. Alapa.)

Q. He did not have any coat on?

A. Didn't have a coat on.

Q. How far out did you go on Waikiki. How far out toward Waikiki did you go?

A. I think we went as far as Kapiolani Road, then out [116-35] and back Beretania Way.

Q. How far out is that?

A. Kapiolani Road is the other side of the Moana Hotel.

Q. The other side of the Moana Hotel?

A. Out past the Moana Hotel.

Q. The road that goes over to Kaimuki?

A. Yes.

Q. Then you went over to Kaimuki?

A. We went out Kapiolani, and out Kapahulu Road, and then drove back. I don't know the names of the streets.

Q. What time was it that you left and went back to the house at night?

A. I didn't look at the clock. I don't know the exact time.

Q. About 11 o'clock?

A. I don't believe it was that late.

Q. But it was,—your drive took probably three-quarters of an hour or an hour?

A. I think around 45 minutes.

Q. All right. You didn't see him again until the night of your arrest? A. I did not.

Q. And that night he came to your house?

A. Yes.

Q. And with this same driver? A. Yes.

(Testimony of Eunice C. Alapa.)

Q. And stopped in front of your house as he had done before? A. Yes.

Q. You heard the automobile stop and came out—
[117-36]

A. I did not go out. He came in.

Q. You opened the door?

A. The door was not closed. The door was open.

Q. You were there. Was anybody else there?

A. Nobody except my grandmother.

Q. Your grandmother was there? A. Yes.

Q. This aged lady is your grandmother?

A. The lady with white hair.

Q. She was there and heard everything that was said at that time?

A. She was in the bedroom reading; had the door about half closed.

Q. Her bedroom is adjoining the other room, I suppose? A. Yes.

Q. She did not see Lee Choy come in the first time?

A. No, he did not go in my house the first time.

Q. He came in and you recognized him as the man you had this ride with before? A. Yes.

Q. What did he say?

A. Said he was working to-night, I says what kind of work, and he said the steamer was in.

Q. By that you understood the steamer that the opium was supposed to come on?

A. He told me he wanted to go on the steamer, and me to make two trips from the steamer.

Q. Did you recognize,—you understood what

(Testimony of Eunice C. Alapa.)

steamer he meant and what the work was, from your previous conversation? [118-37]

A. Yes, I understood.

Q. Did you explain to him that you had told him that you would not do that sort of work for him?

A. I did. I told him I did not want to have anything to do with him.

Q. And that you had not changed your mind at all?

A. I told him I did not care to go at all. He insisted that I go and told me that it would be all right, that I could go on the steamer without any trouble by telling them that I was a passenger as they did not examine women, that I would not be bothered.

Q. When was it that he told you you would get three hundred dollars for these two trips?

A. On this night.

Q. At that time. Is that right? A. Yes.

Q. By the way, did you get any part of that three hundred dollars? A. I never got anything.

Q. When you brought your first load ashore nothing was said about payment?

A. When I brought the first load it was getting late. He wanted me to get back quick and get a second load, before 11 o'clock.

Q. But there was nothing said?

A. Nothing said about any money then.

Q. About how long were you talking there, would you say, before you finally agreed to go?

A. I think about 15 minutes.

(Testimony of Eunice C. Alapa.)

Q. Was anything said about payment being made in advance [119—38] or after the thing was done?

A. There was nothing said about when he would pay.

Q. You had no doubt but what he would pay?

A. I had no doubt but what he would pay me.

Q. You trusted him perfectly. You understood the risk you were taking in doing a thing of this kind? A. I guess I did not realize it.

Q. You understood what it was, it was a crime?

A. I understood he wanted me to smuggle opium.

Q. You knew you were committing a crime, didn't you?

A. I had never had any dealings of this kind before. I didn't know much about it.

Q. You certainly knew it was against the law to smuggle opium? A. Yes, I knew that.

Q. You knew it was something for which you might be arrested, didn't you? A. Yes. [120—(39-40)]

(From cross-examination of Mrs. Alapa, by Mr. ULRICH, Nov. 8, '22.)

Q. You made no arrangement as to how this money was to be paid to you before you took the risk?

A. I did not make any arrangements about the money. He said he would pay me \$300 for the two trips. I did not ask him for the money in advance.

Q. You got dressed then? A. I got dressed.

Q. What kind of dress did you put on?

(Testimony of Eunice C. Alapa.)

A. A white dress and blue cape.

Q. I don't know much about dresses. Was it a loose sort of dress?

A. He told me to put on the loosest dress I had. I put on the loosest dress I had.

Q. And this blue cape? A. And the blue cape.

The COURT.—Did the cape have sleeves in it, or without?

A. There is not any sleeves, just throw over your shoulder. The cape is blue on the outside, kind of henna on the inside,—lined with henna.

Q. Do you know any other Chinamen who have ever spoken to you about opium? Have you ever been approached in this way before by other Chinamen? A. I never have.

Q. You put on this loose-fitting white dress and blue cape and all this time the automobile was waiting outside? A. Yes.

Q. With Yamahara waiting with it? A. Yes.

Q. I want to know about what time, as near as you can place it, [121—41] that Lee Choy arrived at your house that night? A. About 9:45.

Q. How do you fix it as about 9:45?

A. I had been out that evening with my grandmother, and knew I got home at 9:30 when I looked at the clock.

Q. So that he came a few minutes after, and you can place it pretty definitely at about 9:45 that he came. How long was it before you started to go away? A. I think about 15 minutes.

(Testimony of Eunice C. Alapa.)

Q. It did not take you very long to decide to do this thing? A. It did not.

Q. You got in the car with Lee Choy? A. Yes.

Q. How was he dressed on this occasion?

A. Dressed in a sport shirt.

Q. The same way he had been dressed two weeks before?

A. He was dressed in a sport shirt, I told you, the night you spoke of to me.

Q. The night you had a ride to Waikiki?

A. On the first night? He had on a dark suit.

Q. So that all the testimony you have given as to the khaki trousers and the sport shirt did not refer to the occasion of the ride to Waikiki?

A. No, that was the ride the night we went to the steamer.

Q. I want to know how he was dressed the night you went to Waikiki?

A. He was dressed in a dark suit that night.

Q. He had a coat on that night?

A. He had a suit coat on, that night. [122—42]

Q. Did he have a hat on that night?

A. He had a hat on.

Q. You did not see him the first night inside of a house or in a lighted room or anything like that at all, did you? A. No, I did not.

Q. Simply outside in the automobile, and on your front porch? A. Yes.

Q. Now then this second night, the night of the opium smuggling, you left your house about 9 o'clock, that is right is it? A. About 10 o'clock.

(Testimony of Eunice C. Alapa.)

Q. 9:45 was the time he came in, and you drove down directly to the wharf? A. Yes.

Q. In the meanwhile he was explaining to you the *modus operandi*, how you were to act, what you were to say, and everything of that sort?

A. He explained those things in the car.

Q. In the car as you were going down?

A. Yes, sir.

Q. You arrived at the wharf, he told you to wait awhile and then go on the boat?

A. He got off the car before he stopped the car, and went ahead of me.

Q. Did you see anyone or talk to anyone before you were left there, before he left you there?

A. I did not talk to anyone.

Q. He left you, while you waited in the car?
[123—43]

A. He left me, and told the chauffeur where to stop the car, and for me to sit there two or three minutes and then follow him.

Q. He got out before the car stopped?

A. He got out before the chauffeur stopped the car, before we come to the point where we left it, a little ways before the chauffeur stopped the car.

Q. You mean the car stopped. How far away was it when the car stopped the first time?

A. About a block or so,—that is where he got off.

Q. He got off and told the chauffeur where to stop the car. A. Yes.

Q. And the car went on, and so far as you know he followed on foot?

(Testimony of Eunice C. Alapa.)

A. He run along and the chauffeur drove along and stopped. He went toward pier 7.

Q. You saw him running over on the pier?

A. Yes. I remained in the car.

Q. Where did you stop?

A. Stopped at the sidewalk there by the pier.

Q. You drove down Fort Street?

A. I don't know all the streets. I could not tell you what streets.

Q. You don't know whether you drove down Fort Street or the next street?

A. I don't know which.

Q. Did you drive down the street that the street-car runs on?

A. I don't know that either. [124—44]

Q. Did you stop,—you know the piers. Is this pier the pier at the end of Fort Street?

A. I don't know what street pier 7 is at.

Q. Is it at the end of a street? A. The pier?

Q. What kind of a pier is it, a pier with a wooden floor and high sides?

A. Pier 7? Why I had to go up stairs to get to the steamer.

Q. And you boarded the steamer from a sort of platform, after you had gone up the stairs?

A. After I went from the stairs along the street, up pier 7, I walked way back and went on to the gang-plank.

Q. The custom-house officer stopped you and asked if you were a passenger?

(Testimony of Eunice C. Alapa.)

A. He stopped me and asked if I was a passenger, and I told him that I was.

Q. Before you went on the gang-plank,—by the way,—where was the custom-house officer?

A. Standing right by the foot of the gang-plank. Lee Choy was on the steamer at the head of the gang-plank.

Q. Would you know that custom's officer if you saw him again? A. Yes.

Q. Was anybody else standing at the head of the gang-plank with Lee Choy?

A. There was several people there; I don't know who he was with.

Q. He was in plain view; no trouble about seeing this man? [125—45]

A. Oh, yes; had no trouble in finding him at all.

Q. Rather conspicuous, as a matter of fact, without any coat there, wasn't he?

A. Dressed all in light clothes.

Q. You went on up the gang-plank and met him?

A. Yes.

Q. Did he come right up to meet you or move off?

A. When I got off the gang-plank I stepped up to him and he says, "Follow me" and I followed him.

Q. And he lead you down into the bottom of the ship somewhere?

A. Down into the bottom of the ship somewhere.

Q. Of course you understand there is no doubt you were on that boat. I am trying to get all these details to see where you went,— You went down into the bottom of the boat? A. Yes.

(Testimony of Eunice C. Alapa.)

Q. There you met Chinamen?

A. He rapped on the door of a stateroom that some Chinese were sleeping in, and they opened the door and we went in there.

Q. Were there several Chinese?

A. Two or three.

Q. Would you recognize any of those Chinese if you saw them again?

A. No, I don't think so.

Q. You do not think you would recognize any of them. Was there any one particular Chinese who seemed to talk about with regard to the opium than any other? [126—46] A. They all talked.

Q. Did any of them talk to you in English?

A. No.

Q. All talked in Chinese? A. Yes.

Q. Where did you get this opium now?

A. This opium was not in this room. I waited in the stateroom until somebody brought it into the stateroom.

Q. By "stateroom" you mean this place where all these Chinese were sleeping and talking?

A. Yes.

Q. How many Chinese were there?

A. Two or three.

Q. Somebody brought the opium to the stateroom after you had gone to this room down in the bottom of the boat? A. Yes.

Q. Would you recognize that person who brought up the opium to that room?

(Testimony of Eunice C. Alapa.)

A. I did not see the person who brought the opium. I was sitting in a chair and they brought the opium to the door, and when I saw it it was in Lee Choy's hands. I could not identify the man who brought it to the room.

Q. So that you could not identify anybody except Lee Choy after you got on that boat? Any other person you saw who had been there and would have been able to see whether you were there?

A. I saw a lot of Chinese but they all looked about alike to me; I could not identify them.
[127—47]

Q. Were the Chinese dressed in European clothes or Chinese clothes?

A. They appeared to be through with their work, and was lying down resting.

Q. Did they have on the garb of stewards' uniforms, or were they dressed in Oriental costumes?

A. Most of them was dressed in just undershirt and some kind of white pants.

Q. And in this stateroom Lee Choy helped you put on this jacket?

A. He held the jacket and I put my arms in the jacket.

Q. To do that you had to take off the upper part of your dress? A. Yes.

Q. You just took your,— Did you take off your whole dress or just the top part of it?

A. Just simply opened it up, slipped my arms down and put the jacket on.

Q. Underneath?

(Testimony of Eunice C. Alapa.)

A. Underneath the outside gown.

Q. This was a one-piece dress was it?

A. Yes, it was a one-piece dress.

Q. And hung down pretty near to your knees?

A. The jacket you mean?

Q. Yes. A. Yes.

Q. You had room to button your dress up?

A. I had a white belt on the dress and I could not fasten my belt; I had to leave the belt be untied.

[128—48]

Q. Lee Choy assisted you to put that on?

A. He did.

Q. And fix up your dress again afterwards?

A. He did.

Q. And before you put your cape on?

A. I put my dress on, buttoned it up and put my cape on.

Q. And you went out of the stateroom?

A. He told me a Chinese would lead me to the gang-plank, so when I opened the door a Chinese was standing there and I followed him.

Q. I wonder, Mrs. Alapa, if you would be able to go onto the steamer, "President Wilson," and go to the place where you went that evening on that occasion, that is, to the stateroom; the same room?

A. I don't think I could.

Q. If it would be possible you could identify anybody, if any of the same people were there as were there on that occasion. I say that because I understand the boat is now in port.

(Testimony of Eunice C. Alapa.)

A. I don't know that I could take you to the same stateroom; there are lots of staterooms on that steamer. I did not look at the number.

Q. Do you think you could identify any of the Chinese at all?

A. I probably could identify the man that lead me to the gang-plank.

Q. He came to the door and Lee Choy told you that he would take you to the gang-plank?

A. Yes. [129—49]

Q. And he walked ahead of you?

A. He walked ahead of me.

Q. How was he dressed. Did he have on merely a shirt and trousers?

A. He was dressed in some kind of white cloth; I didn't pay much attention to him.

Q. Sort of like a steward? A. Waiter.

Q. You think you might be able to identify that man?

A. I think that I could, but I am not positive.

Q. Did he take you to the same gang-plank that you have gone on? A. Yes.

Q. Where was Lee Choy in the meanwhile?

A. He was in the stateroom.

Q. You left him behind you?

A. Yes, he told me to go ahead and wait in the machine for him outside, and he would come later.

Q. You went on down the gang-plank past the same custom officer whom you had seen before?

A. Yes, past the same custom's officer.

Q. He said nothing to you?

(Testimony of Eunice C. Alapa.)

A. He said nothing to me.

Q. Do you know whether he saw you — He saw you, didn't he, when you passed him?

A. That I do not know. I saw him.

Q. You probably were thinking about being seen at the time and would be paying pretty close attention to whether people were noticing you. Did he seem to observe you when [130—50] you went past or not?

A. He was talking to somebody I believe and he glanced at me, I think, but he didn't say anything.

Q. You went off and got in the machine?

A. Yes, I went off and got in the machine.

Q. You waited there for just a few minutes and Lee Choy came and joined you? A. Yes.

Q. Then the chauffeur drove the car to some place to which Lee Choy had directed him? A. Yes.

Q. Where was this place?

A. I could not tell you that because I do not know the lanes or the street; it was a Chinese lady's house that he took us.

Q. Do you know whether it was anywhere in the neighborhood of the house you live in?

A. No, it was not in that neighborhood.

Q. It was the same place that you went back to later with McDuffie, that is right? A. Yes.

Q. When you got to that place you and Lee Choy got out of the car? A. Yes.

Q. And you went into the house? A. Yes.

Q. And inside of the house there were present what people?

(Testimony of Eunice C. Alapa.)

A. A Chinese lady met us at the door.

Q. A Chinese lady? [131—51] A. Yes.

Q. One Chinese lady? A. Yes.

Q. Would you recognize that Chinese lady if you saw her again? A. Yes.

Q. Was it a young woman? A. Middle aged.

Q. A middle-aged Chinese lady. Was there anyone else there?

A. I did not see anyone else.

The COURT.—Q. Lee Choy went in the room with you? A. Yes.

Q. When you say you did not see anyone else, did you have any reason to believe there was anyone else around the place?

A. The place was very quiet. I walked in the room and Lee Choy walked in with me, and he was wanting me to hurry, he wanted me to go back to the steamer a second time. I did not pay any attention whether there was anybody else in the house or not. The only one I saw was the Chinese lady.

Q. Did she talk in English? A. She did not.

Q. You did not talk to her at all? A. No.

Q. She spoke with Lee Choy in Chinese?

A. Yes.

Q. You undid your dress and took your jacket off?

A. I unfastened the dress, took the jacket off, and laid [132—52] it on the stand that was in the center of the room.

Q. And she took it?

A. No, Lee Choy took it. Lee Choy picked it

(Testimony of Eunice C. Alapa.)

up and put it in a chair and then Lee Choy and the Chinese lady counted the tins of opium.

Q. And found one missing?

A. One missing, they said.

Q. Who told you that?

A. He told me there was one missing.

Q. And you left with him?

A. We left together and went back to the machine.

Q. You wanted to quit that time? A. Yes.

Q. Did you offer to quit for half the three hundred?

A. There was nothing said about the money.

Q. Nothing said about money at all?

A. Nothing at all.

Q. So you simply said you wanted to quit?

A. Yes.

Q. He wanted you to go out and get another load?

A. Yes.

Q. You went in the car together?

A. Yes, both of us.

Q. What time?

A. It was pretty close to 11 o'clock. He said we would have to hurry because at 11 o'clock they changed custom inspectors.

Q. You drove back to the boat? A. Yes.

Q. And practically the same thing happened the second [133—53] time as the first so far as getting on the boat was concerned?

A. About the same thing.

Q. He went ahead of you? A. Yes.

(Testimony of Eunice C. Alapa.)

Q. You went on and found him waiting at the top of the gang-plank? A. Yes.

Q. You went past the same custom-house officer?
A. Yes.

Q. You knew it was the same custom officer?
A. Yes.

Q. And Lee Choy, with his shirt and everything, was up at the top of the gang-plank just as he had been before? A. Yes.

Q. Do you remember whether anybody else was there on that occasion except Lee Choy, if you can remember? A. There was several people there.

Q. Mrs. Alapa, think of both times you were on that boat, all the time you were there with Lee Choy and near Lee Choy, can you think of any person you can remember that ever saw Lee Choy on the boat with you at that time?

A. The only ones I saw Lee Choy talking to was the Chinese.

Q. Did you see any white people while you were on that boat?

A. I did not see him talk to any white people.

Q. Of course the custom's officer would know probably [134—54] if Lee Choy went on the boat twice just ahead of you.

(No response.)

Q. You got on the boat again? A. Yes.

Q. You did not go down below, but went to the first-class passenger's room? A. Yes.

Q. You went into a stateroom? A. Yes.

(Testimony of Eunice C. Alapa.)

Q. After you had been there did he leave you there at all? A. No.

Q. Did he talk to anyone before you?

A. He talked to some Chinese.

Q. Somebody going to the stateroom?

A. Yes.

Q. He followed,—a little ahead of you on the deck? A. A little ahead of me on the deck.

Q. You followed a short distance behind him?

A. Yes.

Q. You did not walk together? A. Yes.

Q. Close enough so that you could follow him?

A. Yes.

Q. You were just ahead of him, on the first trip?

A. Yes.

Q. You sat down, threw off the fan, and somebody came with this vest of opium?

A. Yes. [135—55]

Q. Do you know whether it was one of the persons you had seen when you were there before, the first time? A. I don't know that.

Q. Would you recognize the man again who brought the opium the second time?

A. I didn't see the man.

Q. You didn't see the man?

A. No, I didn't see him.

Q. Something the same sort of thing that happened the first time, someone came in, you don't know who he was and what he looked like?

A. Yes.

(Testimony of Eunice C. Alapa.)

Q. Did he stay while you put on the vest?

A. There was a Chinese in the room on the second time I put on the opium, but I didn't pay any attention to him.

Q. Was he the one who brought the opium?

A. I don't know.

Q. Surely you know whether there was one Chinaman in there besides the man you went there with, whom you say was Lee Choy?

A. From the first stateroom we went to a second. There was no Chinese in the stateroom when we entered the room, after we had entered the room and were sitting down there was a Chinese came, and there was another Chinese came. I don't know which one brought the opium.

Q. So there were two Chinese besides Lee Choy in there while you put on this vest?

A. One Chinese in the room while I put on the vest. There is two that had been to the room.
[136—56]

Q. Do you think you could recognize either of those two?

A. Possibly I could, but I am not positive.

Q. The same sort of thing,—the thing was adjusted in the same way the second time, as it was upon the first occasion? A. Yes.

Q. You took down your dress and put it on and tied your dress and put on your cape and went off?

A. Yes.

Q. Then in leaving did you go ahead or Lee Choy go ahead?

(Testimony of Eunice C. Alapa.)

A. I went ahead as I had before.

Q. Do you know whether anyone saw you go in the stateroom?

A. I don't know. I did not see anyone.

Q. Could you go to that stateroom again if taken to the "President Wilson"?

A. I don't think I could because I didn't look at the number of it.

Q. You know what deck it was on, in respect to the deck you went on that boat from the wharf?

A. I don't remember what deck it was on either.

Q. Don't you remember if you went upstairs or downstairs?

A. We went upstairs. I don't remember if we went up one stairs or two.

Q. Then you came down, and where did you see Lee Choy,—he waited behind?

A. Lee Choy waited on the steamer. I went ahead of him. [137—57]

Q. As you had done before? A. Yes.

Q. You don't know whether he followed along behind or anything of that sort?

A. I didn't see Lee Choy any more after I left that second time, because I was arrested and taken away before he came up.

Q. Then you went down the gang-plank and the same custom's man was there? A. Yes.

Q. Where were you when you were arrested?

A. I was on the street in front of pier 7.

Q. You were on the street in front of pier 7. You had gotten clear off the pier?

(Testimony of Eunice C. Alapa.)

A. Yes. I had walked to the sidewalk and stopped there.

Q. At the time had you gotten to your car, to the automobile yet?

A. I hadn't got to the machine yet.

Q. Mr. McDuffie and Stevenson and all these gentlemen whom you have identified here came up and stopped you? A. Yes.

Q. And asked you whether you had liquor or not?

A. Asked me if I had liquor on my person and I said, "No." They asked me if I had anything else. I didn't answer.

Q. Did they search you, feel your person?

A. They did not.

Q. You hadn't told them at that time that you had anything else, except that you hadn't liquor?

A. I didn't tell them.

Q. And they made no effort to search you until you got to [138—58] the station?

A. They had no right to search me.

Q. They did not search you until you got to the station? A. They didn't do it.

Q. The man who was sitting in the car with you was Stevenson, and felt the opium you say, and said you were loaded with it? A. Yes.

(Recess taken from 10:30 to 10:45 A. M.)

Q. Mrs. Alapa, when you got off the boat the second time and were arrested you had arranged with a man, whom you say was Lee Choy, to follow you and get in the same car again as you had done before, is that right? A. To do what?

(Testimony of Eunice C. Alapa.)

Q. It was arranged between you he was to follow just as you had before? A. Yes.

Q. Did you tell the officers he was going to join you in a moment?

A. I told them that somebody was.

Q. Did you tell them that somebody was implicated in this transaction with you?

A. Yes, I did.

Q. So that they knew if they waited for a few minutes they would have the man?

A. They knew they would find him.

Q. Did they wait?

A. They did not wait. [139—59]

Q. Now how much had you told before you went over to the police station? Had you told him you were working for somebody else?

A. No, I had not. I told them that I was waiting for a party?

Q. And that this party was working with you or what?

A. I did not tell them he was working with me.

Q. Did you describe the party you were waiting for? A. I did not.

Q. Didn't tell them what he looked like, whether a Chinaman or a white man or what he was? A. No.

Q. Did you admit any guilt at all before you left for the police station? A. Before I left?

Q. Left for the police station?

A. No. They asked me if I had anything else

(Testimony of Eunice C. Alapa.)

on me after I told them I did not have liquor. I simply didn't answer them.

Q. They arrested you before you reached the automobile? A. Yes, they arrested me, I think.

Q. Did you say "over here is my automobile"?

A. No.

Q. Did they ask you whether you had an automobile or not?

A. No, they had seen me in the car, I guess. They said they wanted to arrest the chauffeur too.

Q. You didn't point out the chauffeur?

A. No, I didn't point out the chauffeur.

Q. They went right over and arrested this particular [140—60] chauffeur.

A. They went over with me. We got in the chauffeur's car.

Q. Were there any other cars around there?

A. Yes, there were others around there.

Q. They simply went right over and got into this particular car, and taking you with them?

A. Yes.

Q. And you told them you were waiting for somebody, and they simply went off to the police station?

A. Yes.

Q. You got in the car with McDuffie sitting on one side of you at the back, is that right?

A. Mr. Stevenson was sitting at the right-hand side of me as we drove to the police station.

Q. Wasn't Mr. McDuffie sitting on one side of you?

A. He was in the machine, I think he was in the

(Testimony of Eunice C. Alapa.)

front of the car at that time. I believe Mr. Wells and Mr. Wrinkle was in the back seat with me.

Q. You were sitting in the middle?

A. Yes, I was in the middle as we drove to the police station.

Q. One of the other officers sat in front?

A. Yes.

Q. Did you talk to these officers about this matter at all on the way to the police station?

A. We were going to the police station, and before we left for the police station Mr. Stevenson touched me and [141—61] after he touched my side he said, "She is loaded."

Q. There was nothing said about what you were loaded with? A. No.

Q. Opium was not mentioned? A. No.

Q. Nothing said about opium at all until you got to the police station where the opium was found, is that right?

A. Nothing said that I remember of.

Q. Then you went directly to the police station?

A. Yes.

Q. You did not do anything,—stop on the way?

A. Went directly to the police station.

Q. When you got to the police station you were taken into the matron?

A. I was taken upstairs to the room,—I don't know whose room it was.

Q. A matron was called?

A. A matron was called.

Q. She took your dress off, took off—

(Testimony of Eunice C. Alapa.)

A. She told me to unfasten my dress and I unfastened this and helped untie the jacket and took it off.

Q. Was anyone else present?

A. The officers were just outside the door.

Q. Anyone inside with you?

A. Just the matron and I, I think.

Q. Now then when this opium was found I suppose the officers came back in, didn't they? [142—62]

A. Yes, some of them came in.

Q. She handed it over to them? A. Yes.

Q. Do you know who she handed it to?

A. I don't remember.

Q. Then you had a talk with somebody I suppose, didn't you?

A. Then they asked me to take them where I had taken the other opium to.

Q. How did they know there was any other opium?

A. They saw me the first time I came off the steamer.

Q. They told you then they had seen you when you came off before?

A. Yes, some time during the conversation.

Q. What conversation? Did you have a conversation with somebody before you were searched at the police station? A. Not that I remember of.

Q. When was it that they had seen you come off before?

A. They asked me to take them to the place that I had taken the opium.

(Testimony of Eunice C. Alapa.)

Q. How did they know?

A. Maybe they were suspicious. They said they had seen me; they had seen me the first time I came off the steamer, they said.

Q. Who said that? A. The officers.

Q. What officers?

A. Wells and Stevenson. [143—63]

Q. Weren't you talking with some one officer in particular? A. All talking to me at once.

Q. They asked you to take them where you had gone before?

A. Told me to tell them where I had taken the opium.

Q. Now then did you tell them; did you admit then you had taken it off before? A. Yes, I did.

Q. You admitted that you had taken opium before? A. Yes.

Q. You were ready to take them?

A. I told them I would try to identify the house if the driver could stop at the place he stopped before.

Q. Before they asked you to do that, had anybody said anything as to what would be,—what would be done with you if you did this thing or the other thing? A. Nothing said.

Q. Nothing said about making a clean breast of it, show us where the opium was?

A. Nobody asked me anything about it.

Q. You told them what you have on your own volition? A. It was all my own free will.

Q. You are very sure of that? A. I am.

(Testimony of Eunice C. Alapa.)

Q. You are sure when you started off to show them where the opium was you did so simply because you wanted to expose this plot, not because you expected any favors or anything of that sort?

A. I told them simply because I knew I had did wrong [144—64] and was willing to admit it.

Q. You admitted it as soon as they saw the opium. They saw the opium and told you they had seen you before. And where was the driver all this time, do you know? A. The driver of the machine.

Q. Kamahara?

A. When I went upstairs to take the opium off I don't know where the driver was; I did not see him.

Q. You went down and told the driver,—they told the driver to go where he had gone before?

A. They told the driver to drive the car to the point where he drove before, then he drove and stopped and they asked me to identify the house and I did.

Q. Now you don't know,—of course you did not hear any of the conversation that took place between them and the driver, did you?

A. Why they made him take them to the place where he stopped before.

Q. You don't know,—you didn't hear him admit that he had been transporting opium before, he knew where the place was, or he had gone there before or any place whatever, because he also knew he had done wrong?

A. No, I didn't hear him.

(Testimony of Eunice C. Alapa.)

Q. You went over to his place? A. Yes.

Q. Who went with you?

A. Mr. McDuffie, Mr. Stevenson, Mr. Wells and Mr. Wrinkle.

Q. The same crowd that came up from the boat with you?

A. The same crowd that was there when I was arrested. [145—65]

Q. When you got to this house the driver stopped and you said, "That is the house"?

A. The driver stopped and we had to walk in a little lane from the car; we walked in the lane and I identified the house to the officers.

Q. Did you go into the house?

A. I didn't go into the house with the officers. I stood on the porch. They met the Chinese lady and asked me if that was the woman who took the opium that Lee Choy brought before, and I said it was.

Q. The same woman was there?

A. The same woman.

Q. Did you see anybody else there at that time?

A. Yes, sir; the officers asked me to come inside, and several Chinese asleep; they woke each one of them up.

Q. You did go inside then?

A. Yes, after they had gone in.

Q. They woke up several Chinese?

A. Woke up several Chinese that were sleeping, and asked me if that was the Chinese that was with me smuggling opium, and I told them no.

(Testimony of Eunice C. Alapa.)

Q. Didn't you tell them, since you had conceived the idea of making right for what you done wrong, that this Chinaman had stayed back on the boat there? A. Afterwards I told them.

Q. Not at this time?

A. Some time after they pulled the opium off me I told them about him.

Q. You did not decide to tell about that until you got [146—66] to the police station?

A. I knew I was arrested and I would have to go to the police station.

Q. You knew perfectly well it would have been very easy to have gotten these Chinamen that were on the boat with you, if you wanted to?

A. I told them to wait, I had somebody else on there. They did not want to wait.

Q. You saw no one else that you knew in the house?

A. I saw no one in the house I could identify but the Chinese woman.

Q. You would know her if you saw her again?

A. I think I would.

Q. What did she say, if any thing, or do you know? A. She talked Chinese.

Q. You mean to the officers?

A. Yes. I don't know what she said to the officers. They told her they were going to search the house, and I guess she told them to search it. They searched it.

Q. They searched it while you were there?

(Testimony of Eunice C. Alapa.)

A. Yes.

Q. Then you went back to the police station?

A. We were driving back to the police station.

Q. You went back to the police station?

A. Yes.

Q. Now, was anything said to you about your having to remain under arrest or about your being released from custody if you would do anything or anything of that sort?

A. There was not. [147—67]

Q. You were not told that you would be set at liberty if you made these disclosures?

A. I was not.

Q. So far as you knew you were going to remain under arrest? A. Yes.

Q. It was quite a surprise to you when you were let out? A. Yes, it was.

Q. Now nobody said anything about,—I want you to be perfectly sure about this,—

A. Nobody said anything to me about it.

Q. Nobody said anything about it going easier with you or about anything of that kind, if you would show them these people?

A. Nothing was said to me.

Q. When on your way back to the police station you passed an automobile, as I understand you, in which you saw this man whom you say was Lee Choy— A. His car passed ours.

Q. You mean going in opposite directions?

A. We were going in the same direction. He was

(Testimony of Eunice C. Alapa.)

in a car. He was in a car that passed our car and as soon as I saw the machine I saw him.

Q. Where was he sitting?

A. Sitting in the back seat.

Q. You were also sitting in the back seat of your car, were you not? [148-68]

A. I believe Mr. Wells was one of the officers sitting with me.

Q. You were in the back seat? A. Yes.

Q. That is, this other car came up behind you and passed you? A. Yes.

Q. You were looking into the car as they passed and saw this man? A. Yes.

Q. You recognized him at once? A. Yes.

Q. There was another man sitting with him?

A. There was another man sitting in the front with the chauffeur.

Q. There was another man sitting in front with the chauffeur. Was he sitting alone or not?

A. I don't know if he was alone or not. I saw him. I don't remember seeing anybody sitting with him.

Q. You didn't know the car that he was driving in, did you? A. I did not know the car, no.

Q. You didn't know the chauffeur who was driving the car, did you? A. I did not.

Q. Where did he pass you?

A. I don't know the name of the street.

Q. It was on the way from this place where you had been [149-69] back to the police station?

(Testimony of Eunice C. Alapa.)

A. Yes, it was while coming from this house back to the police station.

Q. Was this man hanging over the side of the car or leaning out or something like that when he passed you?

A. He was sitting in the back seat.

Q. Were you looking around for Lee Choy at that time, did you expect to have him pass you?

A. No, I did not.

Q. You were quite surprised when you saw him? A. Quite surprised.

Q. You say somebody in that car called out to somebody in your car, is that right?

A. Why somebody in my car said something about, "Yee Yap" and when they said, "Yee Yap" that is when I saw Lee Choy.

Q. What did they say about Yee Yap?

A. They said, "There is Yee Yap in that machine."

Q. Was that one of the officers that was sitting by you?

A. I think it was officers that was sitting in the front seat that said that.

Q. What kind of looking man was it that was supposed to be "Yee Yap," a large Chinese,—tall or short?

A. Short, heavy-set man, kind of bald-headed.

Q. He was sitting in the front seat?

A. He was sitting in the front seat with the driver.

Q. A short heavy-set man, kind of bald-headed?

(Testimony of Eunice C. Alapa.)

A. Yes.

Q. When they called out this car stopped?
[150-70]

A. Somebody called out for the car to stop, and they stopped.

Q. Did you tell anybody that your accomplice was in that car before they called out. Did you say, "There is the man" or something like that?

A. I said, "There is the man."

Q. Before you had explained everything, how you went on the boat?

A. I had not explained all of that to them, no.

Q. You told them you smuggled this opium for a man? A. Yes.

Q. Had they asked you to describe the man?

A. I did.

Q. Tell them what his name was?

A. Lee. I didn't know his last name.

Q. They stopped the car and brought this man back?

A. They brought this man back and asked me if he was the right man.

Q. And you said it was? A. I said it was.

Q. When the car passed you were you driving,—haven't you any idea of where you were at all?

A. I have not any idea.

Q. How far from the police station, how long after—

A. It was close to the police station at that time. I don't know the names of those streets.

(Testimony of Eunice C. Alapa.)

Q. Was this car going very slowly when it passed you or going rapidly?

A. Oh, he was not going very fast. [151-71]

Q. It was going fast enough to pass your car?

A. Yes, it was going fast enough to pass our car.

Q. Had you made any effort to tell them,—had you told them up to that time that this man had remained on the boat?

A. I told him that he had remained on the boat. He was going to come out and get in the machine with me, but they did not wait.

Q. A man came over and you identified him, you said, "That is the man"? A. Yes.

Q. Had you ever seen this other man that was with him before?

A. This other Chinese in the machine with him?

Q. Yes.

A. I had never seen him before.

Q. They spoke of him as Yee Yap?

A. They spoke of him as Yee Yap, but it was not Yee Yap; it was a mistake.

Q. After that what did they do with the man whom you identified?

A. They put Lee Choy in the back seat with me, and Mr. McDuffie sat in the back seat and we went to the police station.

The COURT.—Mr. McDuffie sat between you and Lee Choy?

A. He sat on the left-hand side, Lee Choy next to Mr. McDuffie. I sat next to Lee Choy.

Q. Still nothing had been said about your being

(Testimony of Eunice C. Alapa.)

released or [152-72] about what would be done with you, or anything of that sort?

A. Nothing was said to me about it.

Q. Then you got to the police station? A. Yes.

Q. Were you locked up?

A. No, I was not locked up.

Q. What was done with you?

A. I asked him if I could get an attorney to get some bonds, and they told me that I had that privilege if I wanted to call an attorney, and I called Mr. Brown but I was unable to get him.

Q. You called him over the telephone?

A. I was unable to get him. Later on Mr. McDuffie found him and talked to him, and later this other gentleman that was in the car with Lee Choy talked with Mr. Brown. I never had any conversation with Mr. Brown that night.

Q. How do you know these other people had a conversation with him? A. I heard them.

Q. He came there then?

A. They had a conversation with him over the telephone.

Q. After they got him over the telephone,—and you had been trying to get him before, why didn't you talk to him over the telephone?

A. The telephone number they had been ringing was listed in his name, but he did not live there, he lived in the apartment next to that. [153-73]

Q. After you knew these other men had gotten him why didn't you talk to him?

(Testimony of Eunice C. Alapa.)

A. Why I didn't think it was necessary to talk to him.

Q. Why didn't you think it was necessary, and had thought it was necessary a little while before?

Mr. PATTERSON.—Objected to as counsel is arguing with the witness.

(Argument.)

The COURT.—Objection overruled.

A. This Chinese in talking to Brown on the telephone tried to get me released.

Q. What Chinese?

A. The Chinese that was in the car with Lee Choy.

Q. He talked to whom on the telephone?

A. He talked to Brown on the telephone.

The COURT.—And Lee Choy and yourself were there? A. Lee Choy had been locked up.

Q. You said on your direct examination that somebody directed your release, Mr. Carden or somebody, you don't know who it was. What do you mean by that? How do you know somebody directed your release?

A. Mr. McDuffie talked to Mr. Brown and told him there was a woman who had been arrested, and wanted to find out about giving some bond, and this Chinese took the receiver and talked to Brown. Mr. Brown said he could not release me, he would phone to Mr. Carden, and find out if I could be released.

Q. You are perfectly sure that before you were released nothing had been said to you by way of

(Testimony of Eunice C. Alapa.)

indicating that [154-74] you were going to be released for having done what you did?

A. There was nothing said to me.

Q. Now since you have been released you have pleaded guilty, have you not? A. I have.

Q. Now before you pleaded guilty was anything said to you by any of the officials by way of suggesting that you would receive a lighter sentence or that you would receive immunity, or that it would go less hard with you if you did plead guilty and if you testified against Lee Choy?

A. There was nothing said to me about that.

Q. Nothing ever has been said to that effect?

A. Absolutely nothing.

Q. No officer connected with the government has said that? A. No, sir.

Q. You are here testifying against Lee Choy. You have pleaded guilty solely because you think it is the right thing to do? A. I have.

Q. You expect no immunity?

A. I don't know what the consequences of the thing will be.

Q. You furnished no bond, did you?

A. I did not.

Q. You are absolutely free, without bond, is that not true? A. I never put up any bond. [155-75]

Q. Now Mrs. Alapa, you know of course that you have not been sentenced, don't you?

A. I don't know.

Q. You know that you haven't been sentenced to jail or anything of that sort?

(Testimony of Eunice C. Alapa.)

A. No, my sentence was supposed to be the 18th of November.

Mr. PATTERSON.—It has not arrived yet.

Q. However that may be, you have not been sentenced. Mrs. Alapa, you say that you know and have known for some months this Japanese chauffeur, Kamahara,—what is his name,—Kamahara?

A. Yes.

Q. What sort of trips has he been taking you on, what sort of work has he been doing for you during those months?

A. About 8 months ago I had occasion to call a car to go out riding with my grandmother or go and do some shopping and I called this stand and I don't know who answered my call but they gave me his car, and since then I have used him several times.

Q. What is your source of income, Mrs. Alapa?

A. I have not been employed since I have been in the Hawaiian Islands. I had money when I came here. I have been working with a theatrical troupe about 15 years.

Q. You haven't done anything since you came here?

A. I have not been employed since I came here.

Q. Mrs. Alapa, I am going to ask you if it is not a fact that you have been practicing prostitution in the [156-76] Territory of Hawaii since you have been here? A. No.

Q. You have not had sexual intercourse with men for money?

(Testimony of Eunice C. Alapa.)

Mr. PATTERSON.—That is objected to on the grounds the question has already been asked and answered.

(Argument.)

The COURT.—I will permit the question.

Q. I will ask you this question, isn't it a fact that this Japanese driver, Kamahara, has been acting for you in the course of the practice of prostitution by you, by the way of bringing customers to you?

A. That is not true.

Mr. PATTERSON.—We object to that, may it please the Court, on the ground that it presumes this witness is a prostitute.

The COURT.—I think your question is proper. Objection overruled. She has answered the question. She has said it is not true.

Q. How much money did you have when you came down here?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

(Argument.)

The COURT.—How would that tend to establish the guilt of the defendant?

Mr. ULRICH.—It goes to the credibility of the witness; it is not offered for the purpose of establishing the guilt or innocence of the defendant.
[157-77]

The COURT.—If confined to that phase solely I will permit the question. It goes to the credibility of the witness, which is involved in this. I will permit the question. A. I had about \$1,500.

(Testimony of Eunice C. Alapa.)

Q. And you have lived on that \$1,500 for a little over a year? A. I have.

Q. And have received no other moneys?

A. I have not.

Q. How long have you been living where you live now? A. Four months.

Q. Before that where did you live?

A. I lived up Fort Street.

Q. Whereabouts on Fort Street?

A. Funchal Lane and Fort Street.

Q. Have you always gone under the name of Mrs. Alapa? A. I have.

Q. Since your husband's death have you lived with any other man? A. I have not.

Q. You have not lived with any Chinese?

A. I have not.

Q. Who is your landlord? A. Tong How.

Q. And you pay the rent? A. Yes.

(Redirect follows.) [158-78]

Redirect Examination.

(By Mr. PATTERSON.)

Q. Mrs. Alapa, what nationality was your husband? A. Hawaiian.

Q. What was his business?

A. He was a musician.

Q. Where did you marry him?

A. El Paso, Texas.

Q. Was he in a show troupe at that time?

A. Manager of a theatrical troupe at that time.

Q. Where did he die? A. Salt Lake City.

Q. Why did you come to the Hawaiian Islands?

(Testimony of Eunice C. Alapa.)

A. Before he died he asked me to visit his grandmother.

Q. Did you ever see his grandmother before you came here?

A. I had never seen his grandmother, but I had seen his mother.

Q. Where did you see her?

A. I met her in San Francisco while she was on her way to the Hawaiian Islands from Salt Lake City.

Q. Do you know whether or not the grandmother has been in the States?

A. Yes, the grandmother has lived in Utah.

Q. For how long? A. I don't know.

Mr. ULRICH.—Objected to.

Mr. PATTERSON.—We have a reason for showing why she is down here. They have gone into that.

The COURT.—As suggested by Mr. Patterson, why is she down here? I think that is redirect examination, based on [159—79] cross-examination.

Q. Have you been living with your grandmother ever since you have been here?

A. I have been living with my grandmother over eight months.

Q. She has been there with you all the time?

A. Yes.

The COURT.—She has lived with you or you with her? A. She has lived with me.

Q. How old is the old lady?

(Testimony of Eunice C. Alapa.)

A. They say she is 91 years.

Q. That is the general reputation she has of being 91 years of age? A. Around 91 years, yes.

Q. Did you see this Chinaman whom you referred to as Yee Yap this morning?

A. I saw him come in the courtroom.

Q. You saw him in here this morning. Was that the man that is supposed to be in the car with Lee Choy that night?

A. He was the man that was in the car.

Q. Could you identify him if he was brought into court at this time? A. Yes.

(Man referred to could not be located.)

Q. Did you know any of these Chinamen down on this boat that night? A. Never saw one before.

Q. Never saw any of them except Lee Choy?

A. No. [160—80]

Q. Has anyone ever promised you you would get off light in your case if you testified in this case, Mrs. Alapa? A. No.

Q. There has never been any promise made you by anyone? A. No.

Q. Your idea was to tell the truth in here?

A. Yes.

Q. You were caught with the goods and would tell the truth? A. Yes.

Q. Nobody promised you would get off for that?

A. No.

Q. You are required to report at the office of the United States Attorney every day? A. Yes.

Q. Do you report that way? A. Yes.

(Testimony of Eunice C. Alapa.)

Q. So you report every day except Sunday?

A. No, not on Sunday.

Q. Did you ever see anyone connected with the United States Attorney's office before you were released in the custody of Mr. Brown, your attorney? A. What is the question?

Q. Did you see Mr. Carden, Mr. Steiner or myself? A. Before these officers?

Q. Before you were released in the custody of Mr. Brown on the morning of the 19th?

The COURT.—There has been nothing said about being [161—81] being released in the custody of Mr. Brown.

WITNESS.—I do not know who I was released in the custody of.

Q. You were released after Mr. Carden,—after Mr. Brown got in touch with Mr. Carden, you testified to? A. Yes.

Mr. ULRICH.—I object to the suggestion that she was released in the custody of Mr. Brown.

The COURT.—She is at liberty, that is obvious.

Mr. PATTERSON.—I wish to show you, as Mr. Ulrich and every attorney knows, by courtesy extended the woman was—

The COURT.—The only thing necessary, she has been released and she is now at liberty.

Q. Did you see me before you were released that night? A. No.

Q. Did you see Mr. Carden? A. I did not.

Q. Did you see Mr. Steiner? A. I did not.

(Testimony of Eunice C. Alapa.)

Q. Could you identify the matron at the police station? A. Yes.

Mr. ULRICH.—I don't object to identifying the matron at the police station. If you bring in a person and say who is this, there is some chance of the witness saying it was the wrong person, but not by saying, "Bring in the matron of the police station. Is this the matron of the police station?"

The COURT.—Of course the proper way technically and [162—82] properly would have been to have brought the party in and ask her if she knows the party.

Q. Who is this woman, Mrs. Alapa, do you know her?

(Referring to woman brought into courtroom.)

A. She is the matron at the police station, she is the woman that took the opium from me.

Recross-examination.

(By Mr. ULRICH.)

Q. You don't know whether the same courtesy you were released by was extended to others—

Mr. PATTERSON.—Objected to.

(Witness excused.)

Testimony of Mrs. Marie J. Aylett, for the Government.

Mrs. MARIE J. AYLETT, called and sworn as a witness for the prosecution, testified as follows:

Direct Examination.

(By Mr. PATTERSON.)

Q. What is your name?

(Testimony of Mrs. Marie J. Aylett.)

A. Mrs. Marie J. Aylett.

Q. What is your business, Mrs. Aylett?

A. I am police matron at the police station.

Q. Here in Honolulu? A. Yes.

Q. Do you know this lady who sits back here with the brown hat on? A. Yes.

Q. Where did you see her before?

A. The first I saw her was at McDuffie's office, upstairs [163—83] at his office.

Q. McDuffie's office upstairs? A. Yes.

Q. Were you on duty that night? A. I was.

Q. Did you have any dealing with her that night?

A. Yes.

Q. What did you do?

A. I took her clothes off, as far as the last dress she had on. It was a vest with pockets.

Q. I am going to show you a piece of clothing here which contains 18 cans and ask you if you recognize that? A. I do.

Q. Examine it? A. That is the very one.

Q. Are you sure of that? A. Yes.

Q. Do you know whether or not there were any tin cans of this kind in the vest that night?

A. Yes.

Q. You are positive of that? A. I am.

Q. You are positive that is the same vest?

A. I am. That is the same vest.

Q. You took it off the woman that is here?

A. Yes.

Q. How did she have it on?

A. Just like this, right close to her body.

(Testimony of Mrs. Marie J. Aylett.)

Q. What did you do with the vest? [164—84]

A. I took it away from her and placed it at the door, which I had partly closed, that the men folks would not see her body, right back of the door. You open the door at the corner.

Q. Do you know who got it after you took it out of the room?

A. And when I had her dressed I called Mr. McDuffie to come in, and I pointed to him, "There is the stuff" and he picked it up and that is the last I seen.

Q. Anybody else there besides McDuffie?

A. Two other gentlemen.

Q. Do you know them? A. I do not.

Cross-examination.

(By Mr. ULRICH.)

Q. You say that you took a vest, which you believe is this vest, off of this lady on that night?

A. Yes.

Q. Did I understand you to say it was right next to her body?

A. Yes, right close to her body. She did—

Q. She did not have it on top of any other clothing whatever?

A. She had an undershirt inside, an under-waist outside of this vest, and a coat outside.

Q. It was under her skirt, underskirt?

A. Yes.

Q. You had to completely undress her except her undershirt to get it off, is that right? A. Yes.

[165—85]

(Testimony of Mrs. Marie J. Aylett.)

Q. Now you say that this is the vest. Do you mean that you really are sure that this particular vest is the vest, and the same one, or that it was a vest something like this?

A. Exactly. That is the exact thing.

Q. What is the particular thing about this vest that makes you know that it is exactly this vest. These marks,—do you remember these marks?

A. I never looked exactly at the marks. That is the first kind I ever handled; because of the kind of clothes. I never seen any of them had the same arrangement.

Q. Of course.

A. But as to marks or anything like that, I don't remember any of the marks.

Q. You do not remember any of these marks?

A. No.

Q. Your reason is because you never saw any other vest like it therefore you assume this is the one?

A. I know that is the one I took off. It had strings. It was all tied in front here, tied it down.

Q. But you took no particular care to notice anything about this vest which would make you know it if you would be subsequently be shown to know it was this same vest and not some other vest of the same kind?

A. I never handled no other but that one, of that kind.

Q. But you have nothing by way of marks on this vest? A. I never noticed any marks.

(Testimony of Mrs. Marie J. Aylett.)

Q. By way of which you could identify this?
[166—86] A. No.

Mr. ULRICH.—I think I will take the court's ruling on a motion to strike.

Mr. PATTERSON.—I am offering this in evidence again at this time, your Honor. (Referring to jacket and tins.)

Mr. ULRICH.—It seems the witness is simply assuming. She can point to nothing on the coat which would distinguish it from any other coat.

The COURT.—The identification can be made almost complete. The lady has herself said she took this off.

Mr. ULRICH.—The matron said she took it to the door and Mr. McDuffie took it away.

The COURT.—She testifies she is absolutely sure.

Mr. PATTERSON.—If the jury does not believe it, I will connect it up by Mr. McDuffie.

The COURT.—I think the evidence is sufficient to admit it. It will be admitted in evidence and marked Prosecution's Exhibit "C."

(Jacket and 18 tins received and marked Prosecution's Exhibit "C.")

Mr. ULRICH.—I object to the cans. They have not been identified.

The COURT.—I take it the strings are part of the vest, and the opium in the pockets are part of it also.

Mr. ULRICH.—How do we know it is the same opium. I object to the opium. I object to that on the ground it has not been sufficiently identified.

(Testimony of Mrs. Marie J. Aylett.)

The COURT.—The vest with the contents that holds the opium will be received. [167—87]

Q. Were you present at any conversation which took place between this lady and McDuffie or any of the officers? A. No.

Q. You had no conversation with her yourself about this matter? A. No.

Redirect Examination.

(By Mr. PATTERSON.)

Q. Did you take the lady's skirt off that night, the skirt? A. Yes.

Q. You took the whole dress off? A. Yes.

Q. Did she have an undershirt on. Did she have drawers on? A. She had drawers on.

Q. Were these cans over the drawers?

A. The whole thing was right around. (Indicating.)

Q. Was this vest placed on her the same as I put it on now? A. Yes.

Q. I put it over my shoulder just like I do a coat? A. Like a vest.

Q. Underneath her dress? A. Yes.

Q. Underneath her coat? A. Yes.

Q. The lady is very much smaller than I am.

A. (No answer.) (Witness excused.) [168—88]

Testimony of Arthur McDuffie, for the Government.

ARTHUR McDUFFIE, was called and sworn as a witness for the prosecution, and testified as follows:

Direct Examination.

(By Mr. PATTERSON.)

Q. Your name is Arthur McDuffie? A. Yes.

Q. You are chief of detectives of the city and county of Honolulu? A. No, sir, Captain.

Q. Captain of detectives. And do you know the defendant in this case?

A. I know him by sight.

Q. A man that sits over there by his counsel?

A. Yes.

Q. You identify him?

A. The last Chinese there.

Q. With his arms folded? A. Yes.

Q. Do you know this lady that sits back here?

A. I know her by sight.

Q. Did you see these people on the night of the 18th of October of this year?

A. And also on the 19th, morning of the 19th.

Q. And on the 18th and also the morning of the 19th? A. Yes.

Q. Where did you first see either one of them?

A. I saw the lady in question in front of pier 7.

Q. About what time of the night was that?

A. It was then just about 11 o'clock. [169—89]

Q. Was anyone with you?

A. Yes, Mr. Stevenson. I was talking to him. Mr. Wells was there and another narcotic man.

(Testimony of Arthur McDuffie.)

Q. And with reference to this woman what happened that night?

A. She was stopped by Stevenson. This narcotic man by the name of Wrinckles he called Mr. Stevenson's attention, he says, "There she goes now" and Mr. Stevenson walked up to the lady and had some conversation, the first part of it I did not hear, and he later asked me if we had a matron up to the city prison.

Mr. ULRICH.—Before the witness progresses any further I am going to ask that no conversation be given as long as they were not in the presence of the defendant.

Q. Just tell what happened.

A. From the pier there we went up to the police station and up into my office.

Q. Who went up?

A. Stevenson, Wrinckles, Wells and myself.

The COURT.—And the lady?

A. And the lady.

Q. What did you do up there?

A. The matron was called and asked to search this woman in my office.

Q. And was such a search made?

A. The search was made, yes.

Q. Was there anything discovered?

A. They were. There was a vest made with pockets in it.

Q. Anything in the pockets?

A. They were twenty tins. [170—90]

Q. Showing you the United States Exhibit "C"

(Testimony of Arthur McDuffie.)

in this case, I will ask you whether or not after an examination of the same you can identify it?

A. (Witness examines Exhibit "C.") That is the vest that was taken from her in my office.

Q. That was taken from her in your office?

A. Yes, sir.

Q. And what did—do you know what happened to it, what was done to it?

A. Mr. Stevenson said to Wells that he better take it and put it in the vault here, a vault at the Federal Building.

Q. Wells took it? Is that right? A. Yes.

Q. Do you know how many cans of opium there were? A. There were 20.

Q. Every pocket was full? A. Yes.

Q. From the police station did you go anywhere else with this woman?

A. Yes, we went up to a house, what they call the new Palama park district.

Q. What did you do there?

A. We made a search of a room.

Q. Of a room or her room? A. A room.

Q. Was this woman with you? A. She was.

Q. Where did you go from there?

A. Went back to pier 7. [171—91]

Q. Anything happen on the way down to pier 7?

A. Not on the way down.

Q. Nothing at all? A. No.

Q. What happened down there, if anything?

A. The woman, Stevenson, myself, Wrinckles and Wells were standing in front of pier 7. They were

(Testimony of Arthur McDuffie.)

two of them left and went aboard the boat and returned about 15 minutes after. We then left pier 7 again and went along the waterfront to Fort Street, up Fort Street, and just a little past Queen, between Queen and Merchant Street, and there was a machine passed. I believe they made the turn, went on past us. He made the turn at Queen Street and we had just made the turn on Merchant Street, towards the police station, in front of McInerney's store; they were somebody in that machine yelled out. We stopped and that machine pulled on ahead of us, I judge about 30 or 40 feet, and there was a Chinaman got out and came over to the machine. In the meantime Mr. Stevenson had jumped over the machine that we were in and had gone up to the machine that had stopped, and Stevenson then brought him over to our machine and was asked, the woman was asked, whether or not that this was the Chinaman she had reference to and she said, "yes, that is him."

Q. Was that this defendant?

A. That is the defendant.

Q. Had she described this Chinaman before?

A. Yes, she had described him, with a number of—

Mr. ULRICH.—I object to anything she had said before the [172—92] Chinaman was brought before him.

The COURT.—You can testify that she described a Chinaman and as a result of that description Mr. Stevenson brought this man over. I am inclined to

(Testimony of Arthur McDuffie.)

think the objection is well taken as to what she said, the description she gave of the Chinaman.

Mr. ULRICH.—I object, if the Court please, to getting all this before the jury.

The COURT.—Mr. McDuffie said she had described the Chinaman, and further states Mr. Stevenson went over to the car and brought this identical defendant to the car in which they were seated.

Mr. PATTERSON.—The defendant brought this Chinaman back to the car? A. Yes.

Q. What happened then?

A. After he were identified he were told to get into the machine. I were sitting on the right-hand side, sitting right on top of the door, and she, the lady, was sitting on the left-hand corner of the back seat. This Chinaman got in and sat about the middle of the seat first, fully 18 inches between the two of them, and when the machine started he moved over towards this woman, he nudged her with his elbow and told her, "No talk, no talk."

Q. You heard that yourself?

A. I heard that myself.

Q. Then where did you go?

A. Went to the police station.

Q. Was there anyone else with Lee Choy that night? [173—93]

A. Yes, there was the driver of the machine and there was a Chinese by the name of Ching Tai and the defendant himself.

Q. Who is Ching Tai?

A. He is a Chinese who does considerable bond-

(Testimony of Arthur McDuffie.)

ing of Chinese that are arrested, classified as a professional bondsman.

Q. He is a professional bondsman? A. Yes.

Q. Then they were all taken down to the police station and booked?

A. Yes, this defendant was booked. I think that the lady was booked also. Those are the two that were booked.

Q. Did there anything else happen that night?

A. The driver of the machine, who was a Japanese, was asked whether this defendant—

The COURT.—The defendant was there?

A. The defendant was present. This Japanese was at the desk and he was asked whether or not this was the man and he identified him as being the man that he had been down to the boat on the previous trip, or one trip before this time they were caught.

Q. He identified him at the police station?

A. Yes.

Q. After this opium, after this alleged opium or vest was removed from this woman did you find this in the room where the search was made by Mrs Allyet, after the search?

A. We were called by the matron to come into the room, and the matron pointed towards where that package was laying [174—94] on the floor.

Cross-examination.

(By Mr. ULRICH.)

Q. This vest is the vest you picked up on the floor there, Mr. McDuffie? A. Yes.

(Testimony of Arthur McDuffie.)

Q. Did you put these marks on there?

A. No. My initials are on there.

The COURT.—Ask Mr. McDuffie to point them out.

(Witness indicates marks on vest.)

Q. You put those on there that night?

A. Yes, sir.

Q. Mr. McDuffie how long a time elapsed between the time that you picked this woman up at the wharf the first time and the time that you put the defendant under arrest, as you say?

A. As I stated before, it was about 11 o'clock that this woman was apprehended and it was about a quarter to one, I believe, when this defendant was apprehended.

Q. Now, then this woman had been with you, aside from the time she was in there with the matron, all of the time during that period of an hour or two between 11 and a quarter to one? A. Yes.

Q. This other machine passed you on Fort Street?

A. We were coming up, it was going down.

Q. You came from different directions?

A. Yes.

Q. Coming from the other direction, who was it that [175—95] first called out or said anything?

A. There was somebody in that machine. I don't know who it was. I figured it was this Ching Tai.

Q. Called out first? A. Yes.

Q. Did Mrs. Alapa, this lady, say anything? Then did you call and the other machine stop?

(Testimony of Arthur McDuffie.)

A. No, we had turned the corner; on account of somebody yelling out the machine was stopped, near McInerney's.

Q. They were the ones that called. They stopped by reason of the other calling? A. Yes.

Q. You did not call out for them to stop?

A. No.

Q. When you went back to the police station the final time, the defendant you say was sitting in the back seat with Mrs Alapa and you were sort of sitting on the door? A. I was sitting on the door.

Q. The two of them right by your side in the back seat? A. Yes.

Q. As soon as he got in the car he sat down by the woman and then nudged over toward her and nudged her once or more than once and said, "No talk, no talk," which you could quite distinctly hear? A. I did, I heard that.

Q. And you were right hovering right over them there?

A. No, I was not, I was in the opposite side of the machine from him, fully three and a half feet from where I [176—96] was sitting to where they were.

Q. Fully three feet to where they were sitting, that is to where the nearest one of them were sitting, you mean?

A. That is the Chinaman sitting next to me.

Q. He didn't shove over to her then?

A. As I stated, there was about 18 inches between the two of them.

Q. He was sitting over nearer to you first?

(Testimony of Arthur McDuffie.)

A. Yes, he was sitting nearer to me and then edged over towards her.

Q. When he got alongside of her you saw him nudge her? A. Yes, I did, with his elbow.

Q. With his elbow far away from you?

A. Yes.

Q. You heard him say, "No talk, no talk"?

A. Yes.

Q. And there was whatever distance there would be, no one would expect you to remember the number of feet or the number of inches,—whatever the distance of it would be between the people sitting in that car, the two persons sitting as near as they could get on the back seat, and you? A. Yes.

Q. What kind of a car was it?

A. I don't know.

Q. A touring car? A. Touring car, yes.

Q. Seven-passenger car?

A. That I don't know.

Q. Room for three people to sit comfortably?

[177—97]

A. There would have been, there were seats back, folded down in the floor.

Q. In the back seat there was room for three people to sit? A. Yes, in the back seat.

(Witness excused.)

Testimony of W. K. Richardson, for the Government.

W. K. RICHARDSON was called and sworn as a witness for the prosecution, and testified as follows:

Direct Examination.

(By Mr. PATTERSON.)

Q. Mr. Richardson, what is your full name?

A. W. K. Richardson.

Q. What is your business? A. Custom guard.

Q. Custom's which? A. Custom guard.

Q. And do you remember the last time the steamship "President Wilson" was in here?

A. Yes, sir.

Q. What date was that? A. 18th of October.

Q. What were you doing that day?

A. I was on guard at the gangway.

Q. At this particular steamship? A. Yes, sir.

Q. What was your duty there?

A. To, well, prevent smuggling. [178—98]

Q. To prevent smuggling? A. Yes, sir.

Q. Do you know Lee Choy? A. Yes, sir.

Q. Where is Lee Choy, do you see him?

A. Yes, sir.

Q. Where is he? Point him out.

A. The second man over there, the middle man there. (Indicating defendant.)

Q. Next to Mr. Ulrich? A. Yes, sir.

Q. How long have you known him?

A. Well, I don't know, not very long.

Q. Did you see him on the night of the 18th?

(Testimony of W. K. Richardson.)

A. Yes, sir.

Q. Where did you see him?

A. Down at the dock.

Q. How many times did you see him that night?

A. Several times.

Q. And do you know whether or not he went on the boat?

A. Yes, sir, he went on the boat.

Q. How did he get on the boat?

A. He has a pass and I just let him go through the gangway.

Q. He has a pass which entitles him to go on the boat? A. Yes.

Q. Did he show you the pass? A. Yes, sir.

Q. Do you know what business he has on the boat? A. Yes, sir. [179—99]

Q. What was his business?

A. He is connected with Ah Chew Brothers.

Q. Ostensibly working for Ah Chew Brothers' store here in town? A. Yes.

Q. That is how he happened to pass? A. Yes.

Q. Do you know this lady back here with the hat on? A. Yes, sir.

Q. Did you ever see her before?

A. Saw her that night.

Q. You remember her. Where did you see her that night? A. She came up the gangway.

The COURT.—Did she have a pass?

A. No, she had no pass.

Q. Why did you let her go up the gangway?

(Testimony of W. K. Richardson.)

A. I stopped her at the gangway and when I asked her for her pass she said she was a passenger.

Q. And then you are supposed to let her go up, is that correct? A. Yes, sir.

Q. How many times did you see Mrs. Alapa that night? A. Twice.

Q. And can you remember whether or not they went up the gang-plank somewhat near the same time?

Mr. ULRICH.—Objected to as purely leading and suggestive.

Mr. PATTERSON.—I will withdraw the question. [180—100]

Cross-examination.

(By Mr. ULRICH.)

Q. Have you any idea as to what time you saw Lee Choy on the boat?

The COURT.—Speaking of the first time?

Mr. ULRICH.—Yes.

Q. Do you remember what time of the night it was you saw him down there?

A. Yes, when the boat was docked, that was about half-past 6 or 7; then he went aboard.

Q. And went on and off two or three times?

A. Yes.

Redirect Examination.

(By Mr. PATTERSON.)

Q. Mr. Richardson, about what time was the last time you saw him down at the boat, that you remember?

A. Well, that is kind of hard because he was just

(Testimony of W. K. Richardson.)

going up and down; about half-past 8 or 9 o'clock.

Q. What is that?

A. About half-past 8 or 9 o'clock.

Q. Are you sure that is the last time you saw him?

A. I am not very positive on that time.

Q. It might have been an hour or two later?

A. Might have been.

Q. You are not positive as to what time?

A. I am not positive.

Q. Can you state whether or not he made any trip up on the boat about the same time the woman did?

Mr. ULRICH.—Objected to as suggesting to the witness what he wants. [181—101]

The COURT.—There was nothing about that in the cross-examination, nothing about the woman.

Mr. PATTERSON.—Question withdrawn. I have no further questions.

Recross-examination.

(By Mr. ULRICH.)

Q. When you say about half-past 8 or 9 o'clock as being the last time you saw him, that is the best of your recollection? A. Yes.

(Witness excused.) [182—102]

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11/8/22.

Testimony of W. K. Wells, for the Government.

Mr. W. K. WELLS, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PATTERSON.)

Q. What is your name? A. W. K. Wells.

Q. Did you ever see this package before, Mr. Wells? (Indicating jacket.) A. Yes, sir.

Q. What is your business, Mr. Wells?

A. Narcotic agent.

Q. Showing you the package, can you identify it?

A. Yes. It has my initials on it.

Q. How about the opium, these cans of opium, the cans that are contained in here?

A. I put my initials on them.

Q. On every one of them? A. Yes, sir.

Q. Examine each one of them please, Mr. Wells. (Witness examines tins contained in jacket.)

Q. Have you examined them? A. Yes, sir.

Q. You are sure that is the same opium, 20 tins of opium? A. Yes, sir.

Q. Where did you get those twenty tins of opium in the vest, Mr. Wells?

A. From Mr. McDuffie's office.

Q. You got it from Mr. McDuffie's office? [183—
103]

A. Yes, sir.

Q. Where did you pick it up?

(Testimony of W. K. Wells.)

A. Near the door, lying down near the door.

Q. Were you there when the matron searched this woman? A. Yes, sir.

Q. You picked it up after she got through searching? A. I think I did.

Q. And you have had it in your possession ever since then? A. Yes, sir.

Q. These two cans, tin cans here, what did you do with these cans?

A. Why Mr. Barrios took two cans out of the jacket on the 24th day of this month to examine, analyze.

Q. Did he return the cans to you?

A. Yes, sir, the following day.

Q. You are sure these were the cans?

A. Yes, sir.

Q. And this other can, did you notice this one in particular, did you notice this one too? (Indicating second tin.) A. Yes, sir.

Q. That is another one you gave Mr. Barrios?

A. Yes.

Q. Of the twenty tins you mention, that you obtained? A. Yes.

Q. It is the same 20 tins you got down to McDuffie's office and had them in your possession up to the time of your producing them here in court?

A. Yes. [184-104]

Q. Do you know Lee Choy? A. Yes.

Q. Is he this gentleman that sits next to Mr. Ulrich? A. Yes, sir.

Q. How long have you known him?

(Testimony of W. K. Wells.)

A. Oh, I think off and on for quite awhile.

Q. What do you mean by quite awhile?

A. I have seen him down to the boats.

Q. Do you know Mrs.—this lady back here?

A. Yes.

Q. What is her name? A. Mrs. Alapa.

Q. On the night of the 18th of October what were you doing, Mr. Wells?

A. Down to the “President Wilson,” pier 7.

Q. And did you see Lee Choy that night?

A. Yes, sir.

Q. How many times? A. I saw him twice.

Q. How many times did you see him down to the boat? A. Three times. I beg pardon.

Q. Where did you first see him?

A. I seen him going on board the steamer.

Q. About what time was that?

A. About ten o'clock, I think.

Q. Who was with you that night?

A. Mr. Wrinkle, and Mr. Stevenson.

Q. With reference to the time of the going on the steamer, [185-105] what place, particular place, did you see him first?

A. I saw him going toward the gangway.

Q. Did you notice him go on the steamer?

A. Yes.

Q. With reference to his movements did you make any note of the movements of Mrs. Alapa?

A. Well she came right afterwards.

Q. What did she do?

(Testimony of W. K. Wells.)

A. She was stopped by the custom officer, and then later she went on board the steamer.

Q. You were on duty that night, were you not?

A. Yes, sir.

Q. When did you next see her?

A. Mr. Stevenson and Wrinkle went on board and I came downstairs. I was coming up town and I got in my car and a fellow came up and talked to me. I had my headlights on. She passed in front of me and she looked kind of bulgy there; she got in the car next to me.

Q. Next to you?

A. Ewa of me. I asked the fellow who she was. He said he did not know, and later I saw Lee Choy get in the car with her.

Q. You are positive that was Lee Choy?

A. Yes, sir.

Q. You can remember seeing him that night?

A. That night going on board.

Q. And saw him get in the car with this woman?

A. Yes, sir. [186—106]

Q. And what happened when they got in the car?

A. They drove away.

Q. What did you do then, Mr. Wells?

A. I came uptown and I went back and I stayed in front of the stairway and I got off and went on, went upstairs, and I saw Wrinkle and Stevenson coming towards me, so I went with them and when we got in the car I told them about it, and I had no sooner got through talking to them when she passed by and went on board again. We waited

(Testimony of W. K. Wells.)

until she came out, came down,—before she came down Stevenson and Wrinkle got off and went and talked to Mr. McDuffie and pretty soon she came down and Wrinkle and Stevenson stopped her.

Q. When she came off the boat? A. Yes.

Q. Did you see her go on board the second time?

A. Yes.

Q. Did you see Lee Choy go on the second time?

A. No, sir.

Q. You didn't see him go on the second time?

A. No, sir.

Q. Had you been around the wharf all the time there? A. You mean that night?

Q. After the woman and Lee Choy drove off in the car did you remain there on the wharf all the time? A. No, I drove uptown.

Q. How long were you gone up town?

A. About 15 minutes, I think.

Q. About 5 minutes, something like that? [187—107]

A. Something like that.

Q. When you came back she was going on board?

A. I came in front of the stairway, left my car there, went upstairs, and Stevenson and Wrinkle were coming towards me.

Q. From the wharf? A. From the gangway.

Q. You saw her at that time? A. No, sir.

Q. When did you see her?

A. Afterwards. Then we got in my car and I told them about her.

Q. You got in your car? A. Yes, sir.

(Testimony of W. K. Wells.)

Q. What did you do then?

A. I told Stevenson and Wrinkle about her.

Q. What did you and Wrinkle and Stevenson do when you got in your car?

A. We stayed in the car, pretty soon she passed in front of me. I said, "That is the woman."

The COURT.—Which way?

A. Going up the stairway to the gang-plank.

Q. That is the second time you saw her that night? A. Yes, sir; the second trip.

Q. What did you fellows do then?

A. Wrinkle and Stevenson went off over to Mr. McDuffie on the sidewalk. I stayed in my car. Pretty soon she came downstairs and Wrinkle and Stevenson stopped her. I drove back in my car, went towards the Waikiki side of the [188—108] wharf, and Stevenson said, "Grab the Japanese, grab the Japanese, grab the car," so I went over and talked to the Japanese and brought them over towards where the three of them were standing.

Q. Do you know who that Japanese is?

A. I know him now.

Q. What is his name?

A. "Hara." They call him "Hara."

Q. You grabbed him and the car that night?

A. Yes, sir.

Q. What did you do after you got in the car?

A. And the three of them got in the car, Stevenson said, "We will drive to the police station." Before they started he said, "Well, she is loaded."

Q. You went up to the police station?

(Testimony of W. K. Wells.)

A. Then we went up to the police station.

Q. Then this searching episode took place up there that you have testified to already?

A. Yes, sir.

Q. After that what did you do?

A. From there we went up to the place, there is a lane between Kukui and Beretania, I don't know the name of it, with a house, a Chinese house, Mrs. Tom Leong's.

Q. From there where did you go?

A. From there went down to the wharf again.

Q. And from there where did you go?

A. From there we were going back to the police station and Wrinkle and I drove up Alakea, Bishop, and on Merchant Street, and I saw two cars standing in front of McInerney's [189—109] when we came up, to the car, I recognized Stevenson standing in front of the front car, and I walked up with Wrinkle and I saw a Chinese fellow sitting in the back seat, and I told Stevenson, "Well, that is the fellow."

Q. What did you mean by "that is the fellow"?

A. That is the fellow that got in the car.

Q. What fellow?

A. This fellow that got into the car with Mrs. Alapa.

Q. Who was that fellow?

A. Lee Choy. Then I asked him if he worked for Ah Chew Brothers, and he said yes.

Q. You asked him, the defendant, if he worked

(Testimony of W. K. Wells.)

for Ah Chew Brothers, and the defendant said yes. That is the defendant that sits by Mr. Ulrich?

A. Yes.

(Thereupon an adjournment was taken until 9 o'clock A. M., Thursday, November 9, 1922.)
[190—110]

On Thursday, November 9, 1922, at 9 o'clock A. M., all parties being present as before, the following further proceedings were had and done and testimony taken, to wit:

(Jury-roll called. All present.)

Mr. PATTERSON.—Mrs. Alapa has brought into court the cape referred to in her testimony.

(Mrs. Alapa produces cape, puts it on and displays it to the jury.)

Mr. ULRICH.—I will stipulate that is the cape she wore.

The COURT.—How was it fastened on?

Mrs. ALAPA.—Like this. (Illustrating.)

Mr. W. K. Wells, recalled to the stand, continues his testimony as follows:

Direct Examination (Continued).

(By Mr. PATTERSON.)

(Last question and answer of preceding day read by the reporter.)

Q. What did you do then, Mr. Wells?

A. We took him back to the car where Mrs. Alapa was and I said, "Is this the fellow" and she said, "Yes, that is the man" and I asked her, "Are you positive about that"? and she said, "Yes."

(Testimony of W. K. Wells.)

The COURT.—She identified him? A. Yes.

Q. What did you do then, Mr. Wells?

A. We drove down to the police station.
[191—111]

Cross-examination.

(By Mr. ULRICH.)

Q. Mr. Wells, how long have you been employed as a narcotic detective here in Honolulu?

A. About 14 months.

Q. And during that time it has been your duty, has it not, to make investigations and arrests with a view to the suppression of the opium traffic and traffic in other narcotic drugs? A. Yes, sir.

Q. And you have been accustomed to going to the boats coming from the Orient with a view of watching for smuggling? A. Yes, sir.

Q. You go down to about every boat that comes in from the Orient, I suppose?

A. No, sir; sometimes every other boat, or three boats, all depends if we haven't got anything to do around town.

Q. On this particular occasion, the occasion of the last arrival of the "President Wilson" from the Orient, you were detailed to go down and watch down there, were you? A. To what?

Q. To watch, watch for smuggling?

A. We went down there to see what we could see.

Q. You say that you have known Lee Choy for some time, is that right?

A. I have known him by sight.

(Testimony of W. K. Wells.)

Q. You have seen him coming on and off boats there? A. No, I seen him down in the wharf.

Q. Haven't you seen him go on and off boats before.

A. No, sir, down in the wharf, he was driving a truck. [192—112] At first I was not positive where I had seen him.

Q. You seen him drive the truck, seen him down around the wharf? A. Yes.

Q. I believe you said you knew that he had a pass to go on the boats, or did you say that?

A. I don't think so.

Q. You knew that he was working for Ah Chew Brothers, did you not?

A. After the third time I seen him then I was positive he was working for Ah Chew Brothers. That is why I asked him.

Q. What do you mean by the third time?

A. I saw him on Merchant Street.

Q. Didn't you know before that that he was working for Ah Chew Brothers?

A. I seen him on the wharf, but after I seen him the first and second time I was not positive where I had seen him.

Q. When you saw him the third time it came to you he was the man you saw driving Ah Chew Brothers' truck, working for them?

A. Yes, sir; that is why.

Q. What time did you go down to the wharf?

A. Around 10 o'clock.

Q. And who went down with you, if anybody?

(Testimony of W. K. Wells.)

A. Mr. Stevenson and Wrinkle.

Q. And you went down to the wharf about 10 o'clock that night? A. Yes. [193—113]

Q. When you got down to the wharf did you drive down in a car?

A. Yes, I drove down in my car.

Q. What kind of a car? A. Ford car.

Q. You parked that car where?

A. About 50 feet I think from the entrance, ewa side.

Q. Ran it up head on, facing the curb, right up against the curb, is that right? A. Yes.

Q. You stayed in the car?

A. When we first went down?

Q. Yes.

A. We went upstairs.

Q. All of you got out of the car and went upstairs? A. Yes.

Q. When you parked your car you of course turned off the engine, and left the tail-light burning.

A. Well, I had my tail-lights and head-lights dimmed, and tail-lights on.

Q. Head-light dimmed and tail-light burning. You went into the wharf and what did you do in there?

A. Mr. Wrinkle and Mr. Stevenson and I were leaning up against a rail near the gangway.

Q. Railing of the gangway? You mean right by the gangway going up on the boat? A. Yes.

(Testimony of W. K. Wells.)

Q. Nothing happened particularly while you were staying there? [194—114] A. No.

Q. How long did you stay there?

A. Twenty minutes, I think. Fifteen or twenty minutes.

Q. And then you arrived, I believe you say, about 10 o'clock? A. About that.

Q. And then you came back,—What did you do then after you stayed there, about 10 o'clock?

A. Mr. Wrinkle and him went on the steamer and I was going uptown.

Q. You came back and got into your car?

A. Yes, sir.

Q. And how long had you been in your car before you saw anybody? A. A few minutes, I think.

Q. Had you started your engine?

A. I had my engines running. I was going uptown and a fellow came up and talked to me.

Q. Who was the man? A. Eddie Drew.

Q. How long did he talk to you?

A. Three or four minutes, I think.

Q. So that it would be about half-past ten when you stopped talking with him?

A. About that, I think.

Q. And after you had stopped, after you had gotten through with that conversation, what happened?

A. Then I saw Mrs. Alapa.

Q. Was Drew still standing there with you when you saw her? [195—115] A. Yes.

Q. He was still standing there with you?

A. Yes.

(Testimony of W. K. Wells.)

Q. And she passed, as I understand you, in front of your car? A. Yes, sir.

Q. Going from the ewa direction?

A. From the Waikiki direction.

Q. You were away from the wharf?

A. Yes, sir.

Q. And she came?

A. From this direction. (Indicating.)

Q. From the direction of the wharf?

A. From the wharf.

Q. And you saw her. Did you recognize her? Had you ever seen her before?

A. No, sir; only going on board the steamer.

Q. And—I thought you were getting to the time that you saw her. I have tried to take you from the time you got down to the wharf until you saw Mrs. Alapa. Now, then as I understand you the three of you got down to the wharf together, went on the wharf, stayed there for about 20 minutes and came back again and got in your automobile. And then you saw Mrs. Alapa going in front of your car. Where had you seen her before?

A. Going up the gangway on the steamer.

Q. While you were standing by the gangway there? A. Yes.

Q. With those three other men? A. Yes.
[196—116]

Q. Something did happen then while you were standing by the gangway?

A. Yes. I didn't understand you at first.

Q. When you got on the wharf there and stood

(Testimony of W. K. Wells.)

by the gangway how long had you been there before Mrs. Alapa went up the gangway?

A. I can't tell how long.

Q. Give me some idea, the latter part of the time, just after you arrived, or what?

A. Just after I arrived there.

Q. And Stevenson and Wrinkle were standing there with you?

A. Wrinkle and I. Stevenson was about 5 or 10 feet away from us.

Q. The custom inspector, Mr. Richardson, was he there too? A. He was in front of us.

Q. Were you close enough to the customs inspector to hear any conversation that took place between him and Mrs. Alapa? A. No, sir.

Q. All you know is as you say, you saw this woman going up the gang-plank?

A. He stopped her, said something to her, and then later on she went on board.

Q. And then what happened? Tell me anything that happened that was of any importance while you were standing there?

A. Well, I came downstairs again.

Q. And you went and got in your car and you were there talking for a few minutes, probably three or four minutes? [197—117]

A. About that, I think.

Q. With Drew. And then along came Mrs. Alapa in front of your car going in the ewa direction from the wharf?

(Testimony of W. K. Wells.)

A. From the wharf, and got in the car next to mine.

Q. How far was the car from yours?

A. Five feet, I think.

Q. Were the lights on in that car?

A. Yes, sir, had lights.

Q. Did you see who was driving the car?

A. Yes, sir, a Japanese.

Q. Did you know that Japanese? A. No, sir.

Q. Hadn't seen him before?

A. Not then, I have seen him before.

Q. You had not seen him before? A. No.

Q. Did you notice what he looked like at that time so you would know him when you saw him again?

A. I took a pretty good look at him then.

Q. Mrs. Alapa came and sat down in the back seat of that automobile? A. Yes, sir.

Q. Then what did you do?

A. Then I saw Lee Choy get in the car.

Q. Which car?

A. Then I saw Lee Choy get in the car with Mrs. Alapa.

Q. How long after Mrs. Alapa got in the car was it you saw this man get in the car?

A. A little while after. [198—118]

Q. What do you mean by a little while?

A. About a minute or so.

Q. I believe you said that as you looked at Mrs. Alapa she seemed to be puffed out or something of that sort.

(Testimony of W. K. Wells.)

The COURT.—Bulging out.

A. When she passed in front of me?

Q. She looked kind of bulgy? A. Yes.

Q. Did that mean anything to you?

A. Not until after Lee Choy got in the car, then I was kind of suspicious then.

Q. You were kind of suspicious then. I see. And you sat there to await developments, to see what they would do? A. No, they drove away.

Q. You just waited, and then drove away,—they drove away right away, did they? A. Yes.

Q. Your engine was going all the time?

A. Yes, sir.

Q. It did not occur to you did it to follow them and see what they did? A. No.

Q. You didn't make any effort to do anything at all by way of telling the other men about it?

A. Until I came back.

Q. You gave yourself time for reflection before you decided on any steps to be taken in the matter; gave yourself time [199—119] to think it over, didn't feel you wanted to act too hastily in the matter,—in a matter like that?

A. I don't understand you.

Q. You say your suspicions were aroused when Mrs. Alapa came down there looking bulgy. When you say your suspicions were aroused you thought perhaps there was some smuggling going on; why didn't you take some steps to follow them up. It would have been a very easy matter to trace them down, wouldn't it? A. Well, I didn't.

(Testimony of W. K. Wells.)

Q. Well I am trying to find out why you didn't.

A. I wanted to go back and tell the other two fellows about it.

Q. Instead of telling the other two fellows about it you took a ride downtown? A. Yes.

Q. And you did not say anything about it to the other two fellows until you saw her again?

A. No, sir; before that.

Q. What was this errand you were doing downtown?

Mr. PATTERSON.—Objected to as irrelevant and immaterial.

The COURT.—This is cross-examination. The objection will be overruled.

Q. What was this errand you were going on downtown, this urgent errand you had downtown?

A. Just rode uptown, that is all, an errand.

Q. To give yourself time to think it over?

Mr. PATTERSON.—I object. That is arguing with the witness. It is not his business what Mr. Wells was doing. [200—120]

The COURT.—It is commenting on the evidence. This is not the proper time to comment on the evidence.

Q. After having given yourself a little errand at the time you came back to the wharf. How long did this errand take you?

A. Five or ten minutes, I think.

Q. Then you went back to the wharf again?

A. To the wharf.

(Testimony of W. K. Wells.)

Q. And you hurried up to see these other two men, or did you go to see them?

A. I walked upstairs and I saw both of them going towards me.

Q. Had you left your car in the same place?

A. No, right in front of the stairway, Waikiki, right in front of the stairway.

Q. Does the curb curve in there or does it extend only across on account of the stairway? What I mean is, does not the road there run out to the wharf and the curb curve around about where that stairway is?

A. In front of the main gate, curves in front of the main gate.

Q. So that the stairway is immediately opposite the,—or in front of a straight piece of curb, is that right? A. No.

The COURT.—You mean the curb runs parallel to the street, or the stairway?

Q. I had an idea that the road ran into the wharf there, and that the curb was cut away to permit traffic to come [201—121] into the wharf at some place along there; the curb would curve in so that if you parked you would not be parked on a straight piece of curb. It may not be that there is any. What I want to know is this, Mr. Wells, is or is not it true that the curb that you ran your car up against, when you parked it there in front of the wharf, continues straight without any curve in it or anything of that sort past the stairway going up on to the wharf?

(Testimony of W. K. Wells.)

A. I think it continues to the main gate.

Q. And then curves in?

A. Yes, the curve that is? I am not sure about it.

Q. And that curve does not start until after you are past the stairway going up on the wharf?

A. From the main gate it starts to curve.

Q. The main thing I want to know is, is there a straight curb right in front of that stairway?

A. I am not sure.

Q. You ought to be able to say if it was there. You have been there enough times. You ought to know.

Mr. PATTERSON.—I object to that as argument.

The COURT.—That is for the jury to say. Objection sustained.

Q. When you parked your car there, Mr. Wells, was your car parked head on against a straight curb?

A. I don't know if it was a straight curb or not; it was up against the curb I know.

Q. You do know it was pointing directly at the stairway? A. My car was? [202—122]

Q. Yes? A. Yes.

Q. You came back and parked your car directly, you took 5 minutes uptown, so it is about a quarter before 11 or somewhere about that?

A. I don't remember.

Q. When you met these two men you reported that you saw this woman in a bulgy condition?

(Testimony of W. K. Wells.)

A. I told them when they were in my car, about it, when they came down and sat in my car.

Q. Then what did you do?

A. Then I, no sooner,—when I was telling them,—Mrs. Alapa passed in front of us and went upstairs.

Q. The second time you did not see Lee Choy at all? A. No, sir; only saw him once.

Q. She passed in front of you the same as she had passed before, excepting you were right in front of the stairway and could see her go upstairs?

A. Yes.

Q. Then what?

A. Then Mr. Stevenson and Mr. Wrinkle went over to the sidewalk and talked with Mr. McDuffie.

Q. What did you do? A. I sat in the car.

Q. Just stayed there, didn't make any effort to follow her on to the boat or anything of that sort. You thought you would wait for her?

A. Waiting to see if she would come back again.
[203—123]

Q. How long did you wait?

A. Didn't wait very long.

The COURT.—What do you mean by “very long”? About how long?

A. Ten minutes I suppose.

Q. And you saw her come back again?

A. Yes, sir.

Q. When you saw her come back again were all of you there in your car?

A. No, sir; Mr. Wrinkle and Stevenson and Mc-

(Testimony of W. K. Wells.)

Duffie were standing on the sidewalk. I was sitting in my car.

Q. And she came off down the steps?

A. Yes, sir.

Q. Who was it that talked to her first?

A. I think Mr. Stevenson if I am not mistaken.

Q. You were still in your car? A. Yes, sir.

Q. He stopped her right in front of the wharf there, is that right?

A. Near the main gate. Then they walked towards Waikiki of the main gate and they stood there for awhile.

Q. He stopped her before she had reached the street then, before she had come out on to the sidewalk?

A. No, he was on the sidewalk.

Q. Right in front of the wharf wasn't she?

A. Yes.

Q. By the main gate you mean the gate going on to the wharf, don't you? A. Yes.

Q. So he stopped her just as she got down from the stairs? [204—124]

A. Near the entrance to the main gate.

Q. Now that was before she had gotten away from the wharf and on to the street; wasn't it?

A. Yes, sir.

The COURT.—You said something a moment ago about being on the sidewalk?

A. That was on the sidewalk.

Q. By the sidewalk you mean the walk leading on to the wharf?

(Testimony of W. K. Wells.)

A. I call that whole place a sidewalk.

Q. What I mean is it was before she had gotten away from the wharf on to the sidewalk, right by the wharf?

A. He stopped her near the entrance of the main gate, then they walked towards Waikiki, on the sidewalk.

Q. Now how far away from the main gate was she, would you say, when they stopped?

A. A few feet I think, she did not stop there, she came walking towards Waikiki.

Q. But when they first stopped her or spoke to her she was just two or three feet from the main gate? A. About that.

Q. What did you do?

A. Then I backed out and went towards Waikiki way.

Q. Following along with them as they walked?

A. Yes, sir.

Q. How long did they walk towards Waikiki?

A. About 30 feet I think.

Q. You thought they might be going — you followed along. [205—125] You did not know how far they were going? A. No.

Q. Did you get out and join the circle there at all?

A. Stevenson said, "What do you want? Go and grab the Japanese." So I left my car there and went towards the machine.

Q. And you arrived with the Japanese?

(Testimony of W. K. Wells.)

A. And I brought them to where they were standing.

Q. Leaving your car over there?

A. No, where it was.'

Q. And then you took the woman and put her in the car with the Japanese, that the Japanese had been driving, is that right?

A. Stevenson and Wrinkle did that. I was standing with the Japanese.

Q. Did you go back with the Japanese to the car?

A. After they got in?

Q. When you had him standing over by the sidewalk. Did you go back?

A. No, he drove over with the car.

Q. With your car? A. No, with his car.

Q. Did you go back with him to the car that they had taken the woman to, to his car?

A. No. He came over with his car, came over with his car to where they were standing.

Q. Then they all got into the other car?

A. Yes, sir. [206—126]

Q. And went back towards town?

A. Towards the police station.

Q. Did you hear anything said about any man that was,—that she was waiting for or anything of that sort? Did you hear Mrs. Alapa say anything about a man that she was supposed to be waiting for?

The COURT.—At or about the time of the arrest?

(Testimony of W. K. Wells.)

A. No, sir; because I was standing with the Japanese at the time.

Q. And they drove up town and you followed in your car, did you? A. Yes, sir.

Q. And how far behind did you follow?

A. Oh, quite a ways back.

The COURT.—What do you mean by that?

A. They drove up to the police station.

The COURT.—That don't tell us very much.

A. Thirty or forty yards.

Q. Their car was in sight all the time as you drove along, wasn't it? A. Yes, sir.

Q. And when you got up to Fort Street their car had stopped, or rather when you got up to Merchant Street their car had stopped and another car had stopped, and the two of them were standing not far apart along the curb, is that right?

A. No, sir; we drove right up to the police station.

Q. You did not stop? [207—127]

A. No, sir; that was on the second trip.

Q. You were present when the opium was brought out at this room?

A. I was outside of the door,—when the matron opened the door.

Q. You did not have any conversation with Mrs. Alapa yourself?

A. Stevenson and McDuffie did.

Q. Not you? A. No, sir.

Q. Did you go on this little trip that they took later to a house where there was a Chinese woman?

(Testimony of W. K. Wells.)

A. Yes, sir.

Q. You went in the car with them?

A. No, I was in my car.

Q. Did you go into that house? A. Yes, sir.

Q. Could you see the Chinese woman in there?

A. Yes, sir.

Q. You did not find any opium there?

A. No, sir.

Q. And you made a thorough search of the house, didn't you? A. Yes.

Q. This was about how long after you had first seen Mrs. Alapa?

A. When we searched the place?

Q. Yes.

The COURT.—You mean the first time when he saw her or the [208—128] second time?

Mr. ULRICH.—The first time.

A. An hour and a half, I think.

Q. Had you ever seen this Chinese woman before? A. No.

Q. Did you see any other Chinese that you had seen before there? A. No, sir.

Q. And then you drove away, following in your car, I suppose? A. Yes, sir.

Q. And they drove down by the wharf again?

A. Yes, sir.

Q. And came back up Fort Street? A. Yes.

Q. And you followed after, behind?

A. Yes. Not behind,—I don't know what street they went up. They said, "Let us go back to the

(Testimony of W. K. Wells.)

police station." I drove up Alakea and over on Merchant.

Q. As you came along Merchant you saw these cars standing there? A. Yes.

Q. Apparently you got there just at the time they had stopped, they had not gotten together; very little talking going on?

A. Both cars were standing still when I got there.

Q. And you got out and went over?

A. To where Stevenson was standing. [209—129]

Q. He was standing by the Japanese car?

A. In the front car.

Q. And that was the car you say you saw this man Lee Choy in? A. Lee Choy.

Q. You had him get out and took him over to the other car? A. Yes, sir.

Q. Did you see any other Chinaman there?

A. I saw Ching Tai standing on the sidewalk with Mr. McDuffie.

Q. You had seen him before, hadn't you?

A. Yes.

Q. You knew him? A. Yes.

Q. Before this evening, Mr. McDuffie, how many times had you seen Lee Choy to know him?

A. Three times.

Q. About three times. You had seen a great many other Chinese people down there at the wharf? A. Yes, sir.

Q. Drivers of trucks that were coming and going? A. No, sir; I was upstairs.

Q. I mean before, not this night,—before you had

(Testimony of W. K. Wells.)

seen on other occasions a great number of trucks and truck drivers for mercantile houses that visit the boats? A. Yes, sir.

Q. Do you think of any other one driver that you had seen to know as many as three times before this evening? [210—130]

A. I can't tell you.

Q. Lee Choy stands out prominently as the only man you can think of. He had sufficiently impressed his personality on you for you to remember him?

A. After the third time then I remembered.

Q. I am talking about before the third time. The first time you saw him that night at that time. As I understand it you say you had seen him around the wharf enough to know him, perhaps three times before that, is that right?

A. Yes, sir.

Q. I am asking you if you can think of any other Chinaman up to that time, truck driver you had seen around there, who had sufficiently impressed himself upon you to be remembered?

A. I saw Ah Chew, seen him down there lots of times.

Q. Is he one of the Ah Chew Brothers?

A. Yes, sir. He does not drive a truck though.

Q. The firm that Lee Choy works for. You had never talked with Lee Choy, had you?

A. No.

Q. You had never had any dealings of any kind with him before that time? A. No, sir.

(Testimony of W. K. Wells.)

Redirect Examination.

(By Mr. PATTERSON.)

Q. Mr. Wells, you are not a surveyor, are you?

A. No. [211—131]

Q. When you talk about thirty or forty feet or fifty or sixty yards, you are not positive of the distance, are you? A. No.

Q. You cannot go down there and show the exact place you were standing every minute of that night, can you? A. No.

Q. You don't know whether you walked at an angle of 35 or 40 degrees when you went in a certain direction? A. Yes.

Q. You have just a general idea of distances?

A. Yes.

Q. In reference to the people, people that are habitually down there on the wharf when the steamers come in, there are a lot of faces down there that you know? A. Well, some.

Q. Do you know some people that come down there every steamer, see them around there every time? A. At times.

Q. There are people you see frequently and you could say you know their faces and know them in that way, but don't know their names, isn't that correct? A. Yes.

Recross-examination.

(By Mr. ULRICH.)

Q. Although you are not a surveyor and cannot tell anything about thirty-five or forty-five degree angles and that [212—132] sort of thing, you

(Testimony of W. K. Wells.)

Q. Know what you are talking about when you say your car is in front of a particular spot?

A. I know what I am talking about; yes, sir.

Q. There is nothing indefinite or uncertain about that, is there? A. No.

Q. What do you mean when you say you are a short distance away from a certain place?

A. Say about 30 or 40,—I am not sure.

(Witness excused.) [213—133]

Testimony of C. T. Stevenson, for the Government.

Mr. C. T. STEVENSON, called and sworn as a witness for the prosecution, testified as follows:

Direct Examination.

(By Mr. PATTERSON.)

Q. What is your name? A. C. T. Stevenson.

Q. You are a narcotic agent?

A. Narcotic agent, Internal Revenue Service.

Q. Located here in Honolulu? A. I am.

Q. Do you know the defendant, Mr. Stevenson, over here? (Indicating.) A. I do.

Q. Do you know Mrs. Alapa? A. I do.

Q. On the night of the 18th of October of this year, or the early morning of the 19th, were you in an automobile with Chief McDuffie? A. I was.

Q. I call your attention to a particular time when— did you and Chief McDuffie see this defendant that night? A. We did.

Q. Where?

A. At the corner of Fort and Merchant Street.

(Testimony of C. T. Stevenson.)

Q. Did you see the woman, see the woman there at that time? A. She was there.

Q. Did you see the woman and the man together that night? A. I did.

Q. What happened? [214—134]

A. Well, the defendant here was in another machine when I first seen him, and agent Wells and agent Wrinkel came up to the machine where I had first seen this man, and in fact he was standing alongside of the machine. We took the defendant back to the machine that Mrs. Alapa was in and she identified him as the man that we were looking for.

Q. What did you do with the defendant then?

A. Took him down to the police station office.

Q. How did you take him down?

A. In an automobile.

Q. Where were you seated? A. Front seat.

Q. Where was she seated?

A. In the back seat.

Q. Where was the defendant seated?

A. In the back seat.

Q. You drove down from there to the police station? A. I did.

Q. Did you hear or notice anything while you were going down?

A. I heard the defendant say something which I was unable to hear the remark given. I don't know what it was. I turned around and when I turned around he was up close to her, I should say 12 or 14 inches space between the defendant and

(Testimony of C. T. Stevenson.)

the side of the seat of the car, the right-hand side of the car. Detective McDuffie was seated on the door of the car with his head inside of the machine.
[215—135]

Cross-examination.

(By Mr. ULRICH.)

Q. You heard him say something but were not able to hear what he said?

A. That is what attracted me. I turned around and as I turned around he was up against Mrs. Alapa, very close against her.

Q. When you saw the defendant at the corner of Merchant and Fort Street, was that the first time you had seen him that evening?

A. The first time that I had seen him that evening.

(Witness excused.)

(H. Miki was sworn to act as interpreter of Japanese.)

Testimony of Yasuhei Kamihara, for the Government.

YASUHEI KAMIHARA, was called and sworn as a witness for the prosecution, and testified as follows: (Through the official Japanese Interpreter, H. Miki.)

Direct Examination.

(By Mr. PATTERSON.)

Q. What is your name?

A. Yasuhei Kamihara.

Q. Where do you live, Mr. Kamihara?

(Testimony of Yasuhei Kamihara.)

A. Robello Lane, Palama.

Q. What is your business?

A. A driver of a rent car.

Q. Do you know the defendant in this case?

A. I do.

Q. Where is he?

A. He is the man sitting at that table, there, the middle man, next to the attorney. [216—136]

Q. What is his name? A. Lee Choy.

Q. Where is your place of business?

A. On Vineyard Street.

Q. This lady back here, do you know her?

A. I do.

Q. How long have you known the defendant, Lee Choy? A. A little over a month.

Q. Where did you first meet this defendant?

A. The first I got acquainted with him was a little over a month.

Q. And how did this happen?

A. It happened this way, I was on my stand when the telephone message came. I took the receiver and had a conversation with a Chinese. He said, "This is the Fort Street Ah Chew Brothers." He asked me who I was.

Mr. ULRICH.—I object to any conversation with any Chinese unless it is shown to be the defendant.

Mr. PATTERSON.—That is preliminary.

Q. You received a telephone message, did you?

A. Yes, I did.

Q. And after you received this telephone message what did you do? A. I went there.

(Testimony of Yasuhei Kamihara.)

Q. Went where?

A. To the store of Ah Chew Brothers on Fort Street.

Q. Was there anyone there to meet you?

A. This Chinese here was waiting for me.

Q. Then what happened?

A. Then he and I went to Young Street.
[217—137]

Q. Did he get in your automobile? A. He did.

Q. Then what did you do?

A. This Chinese told me to drive over to Young Street, so I drove the car to Young Street. He told me to wait and I waited.

Q. What seat did you sit in?

A. He sat in the front seat alongside of me.

Q. You say he waited there at Young Street?

A. I did.

Q. Then what happened?

A. This Chinese then got out of the car and went into a lane. As to which house he went to I do not know. I waited. He got on the car and then he says, "Let us go down."

Q. Where did you go to then?

A. Then we came along Beretania Street, and at the corner of Beretania and Alakea he told me to turn down Alakea.

Q. Then what happened?

A. Then he told me to turn down Alakea Street. I drove the car down Alakea Street and we went down the street that is parallel with the waterfront. I do not know the name. At that corner there he

(Testimony of Yasuhei Kamihara.)

told me to stop the car. I stopped the car and he got off and then I came back.

Mr. ULRICH.—I move to strike all this evidence, if the Court please, it appearing to have nothing to do with the case.

The COURT.—It will show they knew each other.

Q. Did you drive the defendant home that night?

A. He left the car there and I came back to my stand. [218—138]

Q. Did you have a chance to get a good look at him that night? A. I did.

Q. You are positive that is the same man as the defendant here?

A. I am positive. I am positive.

Q. About what time was that, about what date?

A. I could not say as to the date, but I think it was in the early part of the evening, probably around 7 o'clock.

Q. What day of the month?

A. I could not say. That is the first time I took this man on my car.

Q. When did you see him again, if you did see him?

A. I think,—wasn't it on the 18th of October that I was arrested? About two or three weeks previous to the date of that arrest, that he employed my car.

Q. Did he get in your car in this date?

A. He did.

Q. Did he tell you to go to any particular place?

A. Yes, he told me to go to Young Street.

Q. You are sure that is this defendant?

(Testimony of Yasuhei Kamihara.)

A. Yes, I am positive it was him.

Q. Did you go to Young Street? A. I did.

Q. What happened there?

A. He told me to wait and I waited for him.

Q. Do you know where he went to?

A. I don't know which house but he went into that lane, [219—139] the same lane that he went into on the first occasion.

Q. Did he come back? A. He did.

Q. From there where did you go?

A. Then he told me to go up Nuuanu Street. I went.

Q. From there where did you go?

A. When we got up Nuuanu Street he told me to drive into the lane. The lane is Kwong Tung Lane. I drove the car in the lane there, when the car got to the house of that white woman he told me to stop, go in the lane there, turn my car and come to the house there and wait for him, which I did.

Q. Then what happened?

A. Then when I had my car turned I had the car brought in front of this white woman's house. Lee Choy and this woman came out from the house to the place where my car was. Lee Choy got on the car and she, this white woman, stood outside of the car and they had a conversation. As to the nature of the conversation, I do not know.

Q. Do you speak pretty good English?

A. Why I could not speak very good English, but I can understand, "You go here, you go over there" when I am ordered.

(Testimony of Yasuhei Kamihara.)

Q. An ordinary conversation between white people, could you understand it?

A. I could not understand.

Q. Did you understand the conversation that I am carrying on with the interpreter here in English? A. I could not understand. [220—140]

Q. You would not know what we were speaking about? A. I could not understand.

Q. Then what happened?

A. Then we left her premises, drove down Nuuanu and when I got near Bishop Lane he told me to drive into that lane there and we drove into Bishop Lane and at the end of the lane the car stopped. Before he got out he told me to go to the home of that haole wahine and bring her down here. He went into the lane but as to which house I could not say.

Q. Did you go back and get the haole wahine?

A. I did.

Q. What did you do with her?

A. Then I went up to her home and she got in my car and we went down to Bishop Lane. I got down there and waited four or five minutes and I tooted my horn, wondered what became of the man, and all at once he made an appearance, then we drove on towards Waikiki and then afterwards turned home.

Q. Were the Chinaman and the lady in the car at the time? A. They were.

Q. Where did they sit, what part of the car were they? A. Back seats.

(Testimony of Yasuhei Kamihara.)

Q. And then you took the load home, you say?

A. We got back from this lane, this woman told me to stop the car at the entrance of the lane, and I stopped my car and she got off my car there. I turned my car and drove the man down to Mauna Kea Street between Hotel and Pauahi [221—141] and he got off my car there.

Q. After that time did you ever see the defendant again?

A. Yes, the next time it happened on the night of October the 18th.

Q. Where did you see the defendant that time?

A. That evening I went out on work. When I came back I was just putting my car into the stand when he made an appearance.

Q. Did he say anything?

A. He told me that he called me up two or three times on the telephone, and that I was not on the stand. I told him that I went out to work, I just got back.

Q. Did he know your name at this time?

A. He did.

Q. Now, Hara, going back to the first time you went to Ah Chew Brothers, you were called on the telephone. Did anybody ask for you or did they just call for a car?

A. I was the only man at that stand when I took this telephone. A certain name was mentioned. I said he is not on the stand, I was asked who I was and I said "Hara," taking the first letters off,

(Testimony of Yasuhei Kamihara.)

“Kami,” I said I was Hara, and he said come up to Ah Chew Brothers, so I went.

Q. At this last time when he arrived there at the stand did he employ your automobile? A. He did.

Q. And where did you go to?

A. He said he wanted a car. I said all right, and he got on the car, and I asked him where to, and he said Young Street and we went to Young Street. He told me to go to [222—142] Young Street, so I went to Young Street, to the place where I went on the two former occasions, and he told me to wait. I waited. Then after a little wait he came out and got on my car and said “back up” so I backed up. Then we came down around Beretania.

Q. Where did you go then?

A. Then he told me to go up Nuuanu, so I turned my car into Nuuanu and went up Nuuanu, then when we got up to Nuuanu street, when we got near to this Kwong Tung Lane, he told me to drive into this lane, so I drove my car into the lane. Before going to the house of this white woman he told me to slow the car up, so I did slow the car up, then this Chinese opened the door of the car and told me to go to the end of the lane and have my car turned around and so I did. He jumped off the car on to the sidewalk. Then when I had my car at the front of this white woman’s house I waited. Then they both, this white woman and Lee Choy, they both came up and got into my car and sat in the back seats. Then I was ordered to drive, so I did drive until we got into Nuuanu

(Testimony of Yasuhei Kamihara.)

Street, and he told me to go down and I said "Where?" for I didn't know where they were going. Then this Chinese said, "Pier 7." I was told to go down to Pier 7 and I drove my car down on Nuuanu into Queen, into Fort, into a street makai of the former Hackfeld Building. I don't know what that name is, then into Bishop Street, and when the car got near to the makai side of the road parallel with the waterfront Lee Choy told me to slow up. While getting off the car there he told me to wait at the makai side of that [223—143] beach road, so I waited. He walked toward the pier.

Q. Who got off the car first? A. Lee Choy.

Q. When did he get off?

A. He got off the car nearest to the mauka corner of Bishop and Ala Moana Road, about 30 per cent of the road, that is where he got off the road.

Q. About 30 per cent?

A. About three-tenths of the way of the Ala Moana Road.

Q. You mean the car was out toward the middle of the street when he got off?

A. The car was near the center of the road, when he got off.

Q. Still in motion? A. Yes, going slowly.

Q. Where was he when he got off?

A. Going towards pier 7. There were a lot of cars around there.

Q. What did the woman do?

A. I stopped my car on the other side of the

(Testimony of Yasuhei Kamihara.)

street near the sidewalk and after waiting for a few moments she got off and walked toward pier 7.

Q. What did you do then?

A. After a wait the white woman made an appearance, she came along the sidewalk, she got on the car. Right after that Lee Choy got on my car by walking across behind my car, and got on my car on this side of the car. (Indicating.)

Q. What happened then?

A. Then after both of them got on the car there Lee Choy [224—144] told me to back the car up, so I did, and went into Bishop Street.

Q. What then?

A. Then when we got right to the corner of King and Bishop Streets I asked where to; he said Beretania Street. I had intended to go around King Street, but Lee Choy told me to go Hotel on Bishop Street, so I did. I went as far as Hotel and then I turned and came a little ways on Hotel before going into Union, Union to Beretania, and then when the car got on the edge of the corner of Union and Beretania Streets I asked where, then I was told to go towards Kalihi; then when the car got to the corner or near to the corner of Beretania and Nuuanu I asked where; then Lee Choy told me to go to the old baseball grounds; then I drove my car along Beretania when we got near that Japanese automobile stand I was told to drive into the lane in the street that leads from Beretania into Kukui. I drove into that street, and at the corner nearest to Kukui I was told to stop my car by Lee

(Testimony of Yasuhei Kamihara.)

Choy. I stopped my car and then he told me to wait. After I stopped my car this white woman and Lee Choy got off my car and I was told to wait. I saw them go to a lane on the opposite side of where my car stopped. They went into the lane. As to which house I do not know.

Q. Did they come back?

A. After a short wait they both came back.

Q. Then where did you go?

A. They both got on the car. I asked, "Where to?" "To [225—145] the same place." Then I drove my car into Kukui. The Kukui Street bridge was then being repaired. I could not cross that bridge so I drove up mauka on College Walk, then into Vineyard, from Vineyard into River and down to Queen. When I got to Kukui Street where the bridge was being repaired I had intention to go back. He said, "Never mind, go ahead." I went down Queen into Fort, makai of the former Hackfeld Building. When I got to Bishop Street, I had already crossed the crossing, I had the intention of turning down, but he said go ahead. Then I turned down a street on the Waikiki side of the ice plant. That is Alakea Street, went along the street, went to the corner of Alakea and Ala Moana Road. Lee Choy told me to slow up. I slowed my car and he got off the car. He said, "Go on the other side of the street and wait for me," so I did. Then after my car came to a stop a few moments after that, this white woman got out of my car and

(Testimony of Yasuhei Kamihara.)

walked towards pier 7. Where she went I don't know.

Q. About what time of the day was it?

A. When I first picked him up, when he first got on my car, it must have been about either 9 or a quarter to 9.

Q. And the last time that you arrived at the wharf that you have just testified about, about what time was that?

A. I did not look at my time. I could not say what time it was.

Q. To your best judgment?

A. It was probably a little after ten. [226—146]

Q. That is the second trip back. Was Lee Choy in the car that time?

A. Yes, he was on the car. He got off the car at that point that is already stated.

Q. After or before the car had stopped?

A. The car was still in motion.

Q. And after the woman had left the car on the second trip what was the next thing that happened to you?

A. After waiting for some time one of the officers that was here came to a place where I was standing and asked me some questions, and I told him what transpired, as I have already testified here.

The COURT.—Who was it?

The INTERPRETER.—He said something about a white woman.

Mr. ULRICH.—Objected to.

(Testimony of Yasuhei Kamihara.)

The COURT.—Do you know which officer it was? Would you know him if you saw him?

A. Yes, I can recognize him.

The COURT.—Do you know his name?

A. I don't know his name. I only know Mr. McDuffie.

The COURT.—(After two men are brought into courtroom.) Which one of those men?

A. The shorter man of the two, but all these men were there. This man on this side and another man who stepped out just now. They were all down there.

The COURT.—Who was the one that came up and had some conversation with you?

A. The shorter man of the two. (Referring to Mr. Wells.)

Q. Then what did they do? Did they do anything with you then? [227—147]

A. After this conversation with this officer he got on my car and ordered me to go to the place where this woman was standing among McDuffie and the other officers that I have pointed out, a distance of probably 60 or 70 feet. I drove the car to that point there, then they all got in my car.

Q. They all got in your car. Where did you go from there?

A. As to the chief, that is McDuffie, whether he got on my car or not I could not testify to that. Then we went to the police station. On the way down to the police station this tall officer that I

(Testimony of Yasuhei Kamihara.)

pointed out he sat alongside of me. Then he asked me how many were they.

Mr. ULRICH.—I object to the conversation.

Mr. PATTERSON.—(To the interpreter.) Tell him not to say anything about the conversation.

A. We went to the police station. At the police station there was a short examination. After that examination I took the crowd up to the old baseball grounds.

Q. Did you take them to the same place where you delivered the first load of opium?

Mr. ULRICH.—Objected to.

Mr. PATTERSON.—Withdrawn.

Q. Did you take these people to the same place where the Chinaman and this woman had gone on this first trip? A. I did.

Q. Was the woman along? [228—148]

A. She was.

Q. What did they do?

A. We went to this point where the woman and this Chinese first got out. The car was stopped. They all got out, and these other officers that was over there got hold of my arm and took me into this Chinese house and searched,—a search was made there.

Q. Then where did you go?

(Recess until 10:45 A. M. from 10:30 A. M.)

Q. And from there where did you go?

A. And I got on my car and we all went down to pier 7. The car was stopped at the entrance to

(Testimony of Yasuhei Kamihara.)

pier 7, all of us got off on the sidewalk and there we waited.

Q. From there where did you go?

A. Then from there we went to the police station.

Q. What is the number of your car? A. 6703.

Q. Is it a Buick car?

A. It is a Buick car; yes, sir.

Q. Then when you went to the police station what happened?

A. While coming back from the police station when my car got near to the corner of Fort and Merchant, someone in my car called out "Stop," and a car, I do not know whose car, passed my car at that time and was ordered to stop, so I stopped.

Q. And who was in the other car?

A. In that car was Lee Choy and another Chinaman. I don't see him around here to-day. He was here the other day. He was a stoutish Chinese.
[229—149]

Q. Then tell us what happened?

A. Then Lee Choy was placed into my car and we all went down to the police station.

Q. Then what happened?

A. Then Lee Choy was placed down below at the police station first. I followed.

Q. Did you stay in the police station that night?

A. I did.

Q. What happened the next morning, if anything?

A. The next morning a little after breakfast, I didn't have anything to eat that morning, at a point

(Testimony of Yasuhei Kamihara.)

I suppose between the kitchen and the toilet, Lee Choy was there and was sitting on this side near a table. He called me like that, then I went. I did not know what was the matter. When we got nearer to the toilet Lee Choy spoke to me. He said that if I would say that I did not know Lee Choy that he, Lee Choy, would say the same thing.

Q. And was anything else said?

A. Nothing else.

Cross-examination by Mr. ULRICH.

(By Mr. PATTERSON.)

Q. This all happened in the city and county of Honolulu, Territory of Hawaii? A. Yes.

Q. (By Mr. ULRICH.) Kamihara, how long have you known Mrs. Alapa?

A. Seven or eight months.

Q. You have driven her around quite a good deal in that time, have you not? [230—150]

A. Yes, every time she called me up on the phone, I went up there to get her.

Q. Now you say that you have known Lee Choy for about a month or a little over a month, is that right? A. Yes.

A. And that the first time that you met him was on the occasion when you were called over to Ah Chew Brothers and he took your car and took a ride along the various streets that you told us about, is that right? A. Yes, positive.

Q. And you have told us about these various streets that you went on that day, where you turned and just what streets you took. You are positive

(Testimony of Yasuhei Kamihara.)

you went on exactly those streets and no other streets? A. Yes.

Q. Just as positive as you are of anything else you have testified to? A. Yes.

Q. You got Lee Choy at about what time did you say, on that first day?

A. It was probably a little before 7, somewhere along there.

Q. Before 7. And you went over to Ah Chew Brothers and from there took him up on to Young Street, is that right? A. Yes.

Q. Stopping at a certain place on Young Street, and you went into a lane? A. Yes.

Q. And after he had been in that lane he came out and got into your car again and told you to drive where? [231—151]

A. He says downtown, toward town.

Q. And you drove down Young Street how far toward town?

A. I came along Young Street, Pikoi and into Beretania.

Q. You are sure you turned down Pikoi and not some other street and got into Beretania, is that right?

A. No, you do not turn down, you turn up into Beretania from Pikoi.

Q. You are sure you turned off of Young Street up to Beretania Street, going on Pikoi and not some other street, is that right? A. I am sure of that.

Q. And as you testified here this morning, you know positively just exactly what corners you

(Testimony of Yasuhei Kamihara.)

turned, where you went throughout all the time you had Lee Choy with you, that evening, is that right? A. Yes.

Q. How was Lee Choy dressed that night?

A. He was in his shirt-sleeves.

Q. What kind of trousers did he have on?

A. It was,—he had dark colored trousers, whether striped or not I could not see it.

Q. All right. Nothing particular happened on this occasion when you drove him around in his shirt-sleeves, driving to Young Street,—you drove him down to the waterfront and left him down there? A. Yes, sir; that is all.

Q. Now how long was it after that that you saw him again?

A. Two or three weeks previous to the 18th.

Q. But how long after the first time that you saw him? [232—152]

A. Oh, within a week.

Q. And when you saw him the second time how was he dressed?

A. I think he was in a dark suit. He had a coat on.

Q. You came to him the second time,—I believe the second time he came to your stand?

A. Yes, stand.

Q. And when you came in you,—just after you had come in he came up and asked you for a car?

A. As to whether I had come back from my work or whether I had come from my home, when he made an appearance there, I could not very well state.

(Testimony of Yasuhei Kamihara.)

Q. I do not care where he had been. The idea is it was just after you came there that he came up and got your car at the stand?

A. Yes, he came there just about the time I got to my stand.

Q. About what time was that?

A. I think it was a little after 7.

Q. Were there other automobiles there on the stand so that he could have taken those if he wanted to?

A. I think there was a car there, but as to whether the driver was there or not I could not say.

Q. He was waiting for you to come?

A. As to that I could not say, because he walked towards me.

Q. And that is the only other time you had ever seen him before that, when you took him on this little drive. Had you ever talked with him at all excepting his [233—153] directing you to go here and there, as the case might be?

A. No other conversation except he ordered where to go.

Q. When he got into your car on the second occasion at 7 o'clock, where did he tell you to go?

A. To Young Street.

Q. And you went to Young Street, the same place as you had been before, is that right? A. Yes.

Q. And after he had gone into this lane on Young Street and had come out again, where did he go?

A. Then I took a course along Young up Pikoi, up Beretania.

(Testimony of Yasuhei Kamihara.)

Q. Where did he tell you to go, any place or any person's house, or simply tell you to go and turn on Pikoi, and go up Beretania, or what?

A. When we got near to Nuuanu Street he told me to go up Nuuanu.

Q. But before you got to Nuuanu Street had he told you where to go, along Beretania or what?

A. He did not say anything.

Q. How did you know where to go if he did not say anything?

A. Why I asked him where to go and he said go up Nuuanu.

Q. Did he tell you to go up Nuuanu when you first started out? Did he tell you, "Go up Nuuanu Street" or "Go downtown" or what did he say?

A. He did not say that at that point.

Q. What I want to know, Mr. Hara, is whether or not you were given any instructions when you first started out, [234—154] after you got through with the business on Young Street did he tell you to go downtown to Nuuanu Street or any street or house or anything at all by way of directing you as to where you should go?

A. He did not say where to go.

Q. You just started off and did not know where you were going?

A. But he told me to go down.

Q. When you got to Nuuanu Street he told you to turn up Nuuanu Street?

A. He told me to go up, yes.

(Testimony of Yasuhei Kamihara.)

Q. When you had gone up Nuuanu Street way he told you to turn into the street, did he?

A. Yes, he told me to go into a side street.

Q. All these instructions were given just as you went along? You had no idea where you were going until you got to the particular corner where you were going to turn?

A. I didn't know where he wanted me to go. He gave me orders just about the point where I had to turn.

Q. Although you had known this woman for some time you had never said anything to Lee Choy about her, had you? A. I did not.

Q. You had not told him where she was living or anything about her? A. I did not.

Q. When he told you to turn down this lane and finally to stop where did you stop?

A. He told me to stop my car in front of this white woman's [235—155] house and I stopped. While getting off he said, "Go to the end of the lane and come back" so I did.

Q. He simply said stop in front of this house, not naming it as any individual's house?

A. Told me to stop in front of the house.

Q. When he stopped there you recognized the house you had been coming to get this woman before? A. Yes, I know the house.

Q. Did you see where he went after he got out of the car?

A. The car stopped in front of this house and he went up these steps?

(Testimony of Yasuhei Kamihara.)

Q. You did not see where he went, all you saw was him going up the steps?

A. It must be that house, her home; that is the only steps leading up to it.

Q. You did not see him go into the house?

A. I did not see that.

Q. Did you see her come out or anything of that sort?

A. I did not see her come out from that house there at the time I first stopped my car.

The COURT.—Could you see the front door of the house from the automobile where you were sitting?

A. You cannot see the door because it is on the side. No.

Q. The door is on the side of the house?

A. You could not see that door when you enter that lane, from the main street, but after you turn your car in that lane to go out you can then see the door. The door [236—156] faces you.

Q. In other words, the door does not face on the lane, is that right?

A. It does not face the lane. It faces inside.

Q. In order to get to the door you have to go inside of another sort of a little alleyway, and another house (counsel draws diagram); the house would be in here, you would have to go from another alley, come from the side?

A. This is wrong. You have a wrong diagram here. (Witness draws diagram.) This is how it is. This is Nuuanu going up. This is the lane;

(Testimony of Yasuhei Kamihara.)

this is an apartment house; this is a veranda. The door opens that way. This is the place.

Mr. ULRICH.—I would like to introduce that.

Mr. PATTERSON.—No objection.

(Drawing offered in evidence received and marked as Defendant's Exhibit 1.)

The COURT.—Have you ever been inside that house?

A. Yes, I have been inside of that house. I got a telephone message and go there and she is not ready and she says come into the house and wait, so I go inside the house and wait.

Q. Have you taken any other men to that house?

A. I have not.

Q. You are quite emphatic about that are you?

A. I am sure of that.

Mr. PATTERSON.—The truth,—I object to asking if the particular remark is emphatic.

The COURT.—I presume he means "are you sure of that." [237—157] Perhaps it is grammatically the proper thing, or word. I think we all understand it. I see nothing out of the way in that.

Q. Now, Mr. Hara, have you,—after you waited there for a few minutes and the man came out with the woman and talked for a moment or so,—you could not hear or do not understand enough English to understand what they were talking about,—and got into the car and told you to drive out to some place else, is that right?

(Testimony of Yasuhei Kamihara.)

A. Lee Choy was on the car. He told me to go down Nuuanu so I did.

Q. You took him into this lane, and he told you to go back and get the woman? A. Yes.

Q. When you got back there she was waiting for you, is that right?

A. Yes, she was outside the verandah, and went into this lane and I turned my car around and when I got there she was waiting.

Q. I understand you heard nothing that was said between Lee Choy and this woman on any occasion, is that right?

A. I could not hear what they were saying.

Q. You have no idea what they were driving around for or what they were doing at any time you have been testifying to?

A. I could not say what their intent was to ride in the car. They were talking there, talking low; I could not hear.

Q. Had either of them ever said anything to you about [238—158] opium?

A. I did not hear anything about that.

Q. You took them for a drive out to Waikiki?

A. Yes, went out Waikiki.

Q. And how long were you driving?

A. Forty or fifty minutes.

Q. You know nothing about what happened except you drove the car out and back again? Did you drive to Kaimuki or simply out to Waikiki and back?

A. We did not go as far as Kaimuki. I do not

(Testimony of Yasuhei Kamihara.)

know what was going on or what statements was made. Drove up Kapahulu Road in to Kaimuki.

Q. Did you know Lee Choy's name at this time?

A. At that particular time I did not know his name as that of Lee Choy, but I knew his face.

Q. Did you know anything about his name at all? Did you know his name as anything but Lee Choy?

A. I did not ask his name; I do not know.

Q. *What* did you first know what his name was?

A. After this arrest.

Q. The next time that you saw this man was on the night of the arrest, is that right?

A. Yes, night of the arrest.

Q. What time did you first see him on that night?

A. Probably 15 or 20 minutes before 9.

Q. Where did you see him?

A. He came to my stand.

Q. Your stand is where?

A. On Vineyard Street. [239—159]

Q. Whereabouts on Vineyard?

A. Very close to River Street, near River Street.

Q. Where did you tell him to go?

A. I just came back from my work. Lee Choy came there and said, "I called you up on the phone two or three times but you were out." I told him that I was out working, and he told me to go out Young Street, so I drove him out there.

Q. He went to the same place on Young Street you had been these other two times, is that right? A. Yes.

(Testimony of Yasuhei Kamihara.)

Q. And when you left that house, after he had gone in and came out again, where did he tell you to go? A. He said to me, "Turn the car around."

Q. You turned the car around; then what did you say?

A. Then he said go up Keeaumoku, along Beretania and to town.

Q. You followed these same directions and you went down Beretania Street, is that right?

A. Yes. Then when I got near to the corner of Beretania and Nuuanu I asked him where to.

Q. And what did he say?

A. He told me to go up Nuuanu.

Q. And you went up Nuuanu? A. Yes.

Q. And then where did he tell you to go?

A. When I got near this lane, that is Kwong Tong Lane, he told me to go in that lane.

Q. You were surprised to find yourself following exactly [240—160] the same road as you were following before, is that right?

A. No, I was not surprised.

Q. You are quite sure that to save himself the trouble of telling you where to turn at the various corners, when you reached them he did not tell you to go where you had gone at first,—the same place you had taken him before?

A. Sometimes I asked him where to; sometime he tells me before I asked him where to go.

Q. But on this occasion he kept you in the dark as to his ultimate destination until you got there?

A. Yes.

(Testimony of Yasuhei Kamihara.)

Q. Now, what time did you arrive at this house this night?

A. I could not say the exact time, because I could not look at my watch all the time.

Q. Now what time can you fix, at any time around there?

A. Yes, I think it was 15 or 20 minutes to 9.

The COURT.—Do you keep notes of the length of time he is driving and charge accordingly?

A. When he orders me, or when an order is received that I am to drive the car by the hour, then I look at the time, otherwise not.

Q. And you left the garage on this trip about a quarter to nine. Bearing that fact in mind, bearing the fact of your trip out on Young Street, going in the house out there, and driving to Nuuanu Street, and all that, what time would you say it was when you reached this [241—161] woman's house? A. It was probably near 9:30.

Q. How long did you stay there before you took them away? A. Probably five minutes.

Q. He went—you saw him go into the house this time, did you? A. I saw him go in.

Q. And then the woman came out and you drove them both down to the pier, being directed where to turn as you reached the various corners?

A. The both of them got on the car.

Q. You drove them down to the pier, you not being told to go to pier 7; you turned this street and that street until you got down there, is that right?

A. The order to go down to pier 7 was given me,

(Testimony of Yasuhei Kamihara.)

I think, when I reached near the corner of Vineyard and Nuuanu.

Q. Before you reached there, as you were approaching the Ala Moana Road, or as I believe you say you had gotten out into the Ala Moana Road, Lee Choy told you to slow down and he jumped off, is that right?

A. Before he got off the car he told me to slow my car down, then he got off the car. It was nearest to the mauka corner.

Q. It was after you had gotten out into the big wide road down there in front of the wharf, is that right?

A. The corner had already been crossed.

Q. He got out out in that road?

A. Yes. [242—162]

Q. You went over and parked your car facing the curb, is that right? A. Yes.

Q. Where did you park your car with reference to pier 7, on the ewa side of the pier or on the Waikiki side of the pier? A. On the ewa side.

Q. How far from the pier, would you say?

A. Probably a hundred feet; I could not say exactly, but I think it was about.

Q. After Lee Choy had gone to the middle of the street how long was it before the woman left your car?

A. Probably two or three minutes.

Q. How long were they gone?

A. Within ten or fifteen minutes.

Q. Did you see any other man around there that

(Testimony of Yasuhei Kamihara.)

you know or have since known, while waiting for Lee Choy and this woman to come back?

A. I did not.

Q. When the woman came back did you notice anything peculiar about her appearance?

A. She did not look very much different to me from the time she got off and the time she came back.

Q. Nothing about her that attracted your attention to her appearance?

A. I did not notice anything out of the ordinary.

Q. She simply came in the car, sat down, waited there for awhile, and then Lee Choy came out there and got in. A. Yes. [243—163]

Q. And then where did you go to; where did he tell you to go?

A. He told me to back the car up so I backed the car and turned up Bishop Street, and drove up Bishop Street.

Q. Then he told you where to go when you came to the various corners, or did he tell you where he wanted to go?

A. As we neared the corner of King and Bishop Street I asked him where to, then he said to Beretania Street.

Q. And he continued to direct you without giving the various streets where he turned over from corner to corner, until you finally reached the place where he told you to stop?

A. Well, my car was in motion and when I asked him what direction then he gave me.

(Testimony of Yasuhei Kamihara.)

Q. Finally you came to a place where you stopped and where was that place?

A. I finally stopped my car at the point he told me to stop. This point is in a side street that leads from Beretania to Kukui, and the point is nearest to Kukui Street.

Q. Did you go inside the house? A. I did.

Q. Or waited outside while they went inside?

A. I was on the car.

Q. You didn't see anybody who was in the car or who came out of the house?

A. You could not see that house, a private place.

Q. You could not see the house from where you stopped? [244—164]

A. You could not see the house. They went in a lane.

Q. So you don't know, or you didn't know until you went back the second time where that house was, did you?

A. I did not know at that time, but when the detectives went there with me I found out the house.

Q. After you stayed there for awhile you went back to the wharf?

A. He told me to go down to the same place.

Q. You went and stopped at the same place?

A. It was not at the same spot, because when I got to the corner of Bishop Street and that side street,—I had already passed the corner,—had intention of turning my car. He said, "Never mind."

Q. Practically the same thing happened as happened before? He jumped out of the car and the

(Testimony of Yasuhei Kamihara.)

woman waited a little while and she went on board and went and left you, and then you waited and finally she came back? A. Yes.

Q. So that Lee Choy left the automobile and jumped out before it stopped and you did not see him again until you saw him later,—until the time you were all on the way to the police station?

A. Yes, I did not see him until I saw him near the corner of Merchant and Fort.

Q. Now never mind about the rest of the things until we come to the point where you are supposed to go on that [245—165] trip back to the house where you had taken this woman before. What sort of directions did you receive and from whom, as to how you should go to that house or where you should go when you left the police station?

A. The detective told me to drive my car to all those points where I went.

Q. Did he say anything about driving to a house where you had been, to retrace the whole path?

A. There was that white woman in the car there. I was ordered to drive my car to the point where I stopped, so I went.

Q. You stopped the car in the same place where you were before? A. Yes.

Q. Where you could not see the house where they had gone into?

A. You could not see the house.

Q. They took you out and took you in the house?

A. That fellow out there took me into this house.

Q. Now after this was all over, and you finally

(Testimony of Yasuhei Kamihara.)

got back to the police station again, having picked up Lee Choy on the way,—by the way,—I want to ask one question in connection with that. You say that you, as you passed this car, or as this car passed you, about Fort and Merchant Streets,—this is after you had been down to the wharf, somebody from your car called out or did you say somebody from the other car called out?

A. After leaving pier 7 we came up Fort Street. My orders were to drive to the police station. When we [246—166] got near the corner there a car pulled up and I think that car stopped near to the Bank of Hawaii and something was said,—I don't know what it was,—and the detective must have heard that, and the detective ordered me to stop my car.

Q. What I am trying to find out, the only thing so far as this question is concerned, is whether or not the call was made from your car or the other car by reason of which the cars came to a stop?

A. These,—this car had already passed my car going up Fort Street. My orders were to go to the police station. I think it was a voice from the other car that made the car stop.

Q. A voice from the other car, the car that had in it, as you later discovered, Lee Choy and this other Chinaman? A. Yes.

Q. Did you hear anything said about Yee Yap by anybody in your car?

A. Yee Yap? I did not hear.

(Testimony of Yasuhei Kamihara.)

Q. When you went back to the police station you were taken downstairs and locked up, weren't you?

A. Yes.

Q. Did they tell you why they were locking you up there? A. I did not hear.

Q. You did not know what it was all about?

A. I did not know.

Q. Did you make any effort to get hold of a lawyer, or [247—167] get bail, or have yourself released in any way?

A. The next morning, yes, I did. I asked one of the men down there, a Japanese, to telephone over to my home the next morning, because I was very much worried about my family.

Q. So far as you know you were never charged with anything, but were simply held there overnight and then released in the morning, is that right?

A. No, I was brought up here.

Q. Brought up here to see Mr. Patterson, is that right? A. I did, yes.

Q. And you were examined by him, were you?

A. Examined by him.

Q. And then were released without being charged with anything, is that right?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I think it is part of the case. Objection will be overruled.

Mr. PATTERSON.—I will admit that; I will admit those other people were not charged.

(Testimony of Yasuhei Kamihara.)

The COURT.—I think it is proper cross-examination.

The WITNESS.—I never heard anything.

Q. I am just going to ask one more question, and that is this: Isn't it a fact that for some months past you have been acting as a procurer or as a person who secures customers or men for Mrs. Alapa in the course of her practice of prostitution? [248—168]

Mr. PATTERSON.—That is objected to, may it please the Court, on the ground it is incompetent, irrelevant and immaterial.

The COURT.—The question is substantially as asked very early in this cross-examination. The question it seems to me has been asked, Mr. Ulrich.

Mr. PATTERSON.—I am not sure, your Honor. If there is any argument in this matter—if the question has been asked, there is no occasion of asking it again.

The COURT.—Was it not asked in substantially the same form very early in the examination?

(Argument.)

The COURT.—It seems to discredit the testimony of this witness, although it may incidentally bear on Mrs. Alapa's testimony.

Mr. PATTERSON.—Objection withdrawn.

(Question read by the reporter.)

A. I have not done that; this woman or any other woman.

Q. Do you know a man by the name of Wong Yuen?

Mr. PATTERSON.—Objected to—

The COURT.—I don't know the purpose of the question. I think you cannot enter into the trial of these issues. Of course questions can be put to test the credibility of the witness. The fact that it might incidentally reflect upon another would be no objection. I don't know the purpose of this question. I will assume it is proper for the time being. We will assume it is proper.

Mr. ULRICH.—I propose to ask the question as to whether he knows this man, as to whether or not he has not had [249—169] a certain transaction with this man, with reference to undertaking to get this woman for him.

The COURT.—That is whether or not this man had?

Mr. ULRICH.—Whether or not it is not a fact he had undertaken to get this woman for this man, the particular man.

The COURT.—On the theory, with the understanding, that you will be bound by his answer. I will not consent that you should bring in that other man to establish that.

Mr. ULRICH.—I will be bound by this witness at this time. As to whether she is that character or she is not that character of woman, regarding other evidence, we will argue it at that time. I think of course we can do it.

(Argument.)

The COURT.—Would not that go to the credibility of the witness? I am inclined to believe that

(Testimony of Yasuhei Kamihara.)

the question is proper. If it is desired by counsel, and it is frequently done, the jury is not to consider—I will say to you now, Gentlemen of the Jury, any question put by counsel which is not brought forth by any evidence, you will disregard the questions or question of counsel,—the question of counsel is not evidence.

Mr. PATTERSON.—I still think this question should not be allowed.

The COURT.—It will go to the character and credit of this witness' testimony, and I will permit this question.

(Question read by reporter.) [250—170]

A. I do not know him.

Q. I will ask you this. You probably do not know his name. I will ask you this question, and take a ruling of the Court. Is it not a fact that within the past three or four days, we will say within the past week, you have had a conversation with a man, a Chinese man, in which Mrs. Alapa, who had been seen riding in your automobile, was discussed between you, and which you agreed to procure her for this man for the purpose of prostitution?

The COURT.—This, Mr. Ulrich, from your question, has occurred since the alleged commission of the offense for which she is now on trial.

Mr. PATTERSON.—I submit the question is incompetent, irrelevant and immaterial and not proper cross-examination and not proper for any purpose. It does not seek to impeach this witness of any

testimony that has been offered by him in evidence, and so, may it please the Court, I say that questions of this kind gather atmosphere in the course of the trial and the jury get to believe them.

The COURT.—We can safely assume that the jury will abide by the instructions of the Court. They are intelligent men, and as I have told them, they are not to consider any question put by counsel. The question is not evidence, but only the answer you get from the witness on the witness-stand. I think this is objectionable, all these matters rest in the discretion of the Court. This having occurred subsequent to the alleged offense, in fact it having been alleged to have [251—171] occurred quite recently, I think at this time I will sustain the objection on that grounds.

Mr. ULRICH.—Let my exception appear in the record.

The COURT.—Exception allowed.

(Thereupon an adjournment was taken until 9 o'clock A. M., Friday, November 10, 1922.) [252—172]

On Friday, November 10, 1922, at 9 o'clock A. M., all parties to the action being present, the following further proceedings were had and done and testimony taken:

(Jurors all present.)

The COURT.—I have decided that you may ask that question with regard to the Chinaman that you put yesterday just before adjournment, Mr. Ulrich.

(Testimony of Yasuhei Kamihara.)

YASUHEI KAMIHARA, resumed the stand as a witness for the prosecution, and continued his examination as follows: (Through the Official Japanese Interpreter H. Miki.)

Cross-examination (Resumed).

(By Mr. ULRICH.)

Q. Is it not true that within the past few days, probably a week, at least within the past week, you made an arrangement with a certain Chinaman by which you agreed to procure this woman for the purposes of prostitution,—some Chinaman?

A. There was nothing of that kind.

Q. Since Mrs. Alapa gave her testimony to the Court have you talked with her about this case, or about her testimony in the case?

A. Nothing of that sort.

Q. Have you talked over what you were going to testify to in this case with Mr. Patterson, the United States attorney?

A. Yes, I have talked with him; I was questioned.

Q. Has anything been said to you about the possibility [253—173] of the confiscation of your automobile for carrying opium?

A. Nothing of that sort.

Q. You have been offered no immunity by the prosecution or any promise of immunity if you would testify in this case?

A. There was no promise.

Q. It has not been suggested to you that it would

(Testimony of Yasuhei Kamihara.)

be easier for you or that it would be better for you if you would give your testimony in this case?

A. I never heard anything of that sort.

Q. You are simply making a clean breast of it because you think it is the right thing to do?

A. Yes, I am telling the truth.

(Witness excused.)

Mr. PATTERSON.—The prosecution rests, your Honor.

Mr. ULRICH.—At this time we will present a motion and ask for a directed verdict. As explanatory of the motion which we now present, let me call the Court's attention to the fact that the indictment purports to be in two counts, the first count charging the defendant with unlawfully, fraudulently, knowingly and feloniously receiving, concealing, buying, selling and facilitating the transportation, concealment and sale of, after having been imported into the United States, a certain narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium, and the second count of the indictment charges the defendant, [254—174] that he did "on or about the 18th of October, 1922, at and within the said district, and within the jurisdiction of the court, did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt, derivative and prep-

aration of opium, and was so purchased, sold, dispensed and distributed.”

There is this further feature of the indictment, before I present the motion. First we have what is purported to be an indictment signed by the foreman of the Grand Jury, merely starting out, “Indictment. Count I. Violation of the Act of February 9, 1909, as amended by the Act approved January 18, 1914, as amended by the Act of May 26, 1922. Count II. Violation of Section 1 of the Act approved December 17, 1914, as amended by Section 1006 of the Revenue Act of 1918, re-enacted by section 1005 of the Revenue Act of 1921. A true bill. James F. Fenwick, Foreman. William T. Carden, United States Attorney.” That purports to be an indictment. Of course there is no charging clause, no finding clause, no recitation as to the empanelment of the grand jury. There follows I imagine what purports to be a secondary indictment. I may say as far as the first part of my motion is concerned it might have been taken up on a motion to quash. The second part of the indictment has count one, in which there is a [255—175] charging clause, “The grand jurors of the United States empaneled and sworn” etc., etc. “present that: Lee Choy on or about the 18th day of October, 1922”— There is no finding of any bill at all so far as the second explanatory indictment is concerned, until after the charging clause that he did on a certain day import, or rather facilitate the transportation of opium after it had been imported.

At the end we merely have the signature of the United States attorney.

The COURT.—Does he allege the date?

Mr. ULRICH.—Alleges the date on which the offense is supposed to be committed. No finding by the grand jury; no finding of any bill at all. I will contend it is not an indictment at all so far as this part of the indictment is concerned. The same is true of count 2.

The COURT.—Let me see the indictment. (Inspects paper.) The foreman does say a true bill.

Mr. ULRICH.—Yes, to that particular part of the indictment, if it is an indictment. If the Court please we move at this time for arrested judgment on the ground there is no true bill of indictment in this cause.

The COURT.—The Court has no power to make judgment at this time.

Mr. ULRICH.—I think it would be proper to make a motion,—if we do not rest, it should be more properly a motion for the discharge of the defendant.

The COURT.—A motion for a directed verdict, you mean? [256—176]

Mr. ULRICH.—No, a motion for discharge of the defendant. A motion for a directed verdict would more properly be made at the close of the case.

The COURT.—The case is now in the hands of the jury,—with regard to what they shall do with the defendant.

Mr. ULRICH.—As I understand it, at the close of the prosecution's case, it would be equivalent

to a civil case motion for nonsuit; that is presented without instructions to the jury. This would correspond, in a criminal case, to a civil motion for nonsuit. In the Circuit Court recently, after consideration, we have decided that it should be presented in a motion for the discharge of the defendant.

The COURT.—That has been a practice in the Circuit Court of Hawaii. I don't know what the proof has been in this Court under such questions arising in the Circuit Court, it would be moved that the Court direct the jury to return a verdict and that the defendant be discharged.

Mr. ULRICH.—On the ground there is no true bill of indictment. If there is no true bill of indictment there is nothing which could properly be brought before the jury at all.

I move at this time, if the Court please, for the quashing of the indictment and dismissal of the defendant on the ground that he is held to answer before this Court and jury on no true bill of indictment. Of course the motion to quash is a motion to dismiss. I don't know whether the Court wants to hear argument on these matters in the presence of the jury or not. Second, [257—177] I further move at this time, if the Court please, for an order of the Court directing this jury to find the defendant not guilty and for the dismissal of the charge against this defendant and discharge thereunder.

The COURT.—Do I understand you ask that the Court should find the defendant not guilty?

Mr. ULRICH.—Yes, your Honor, not guilty on the trial of the charge alleged. It would be more

proper to discharge on the first motion first. I want to get these motions before the Court.

The COURT.—I understand you wish now to argue the motion. There is a rule in some courts this motion should be made in the presence of the jury.

Mr. ULRICH.—I would like to make both these motions now.

The COURT.—I understood you made them.

Mr. ULRICH.—The first motion had to do with the insufficiency of the indictment, the second motion is for the direction of a verdict of not guilty, for the dismissal of the charge and discharge of the defendant on the ground that as to the first count of the indictment there is no evidence of any act committed by this defendant which shows or tends to show that he feloniously received, concealed, bought, sold or facilitated the transportation concealment and sale of any opium after it had been imported into the United States.

As to Count II of the Indictment, on behalf of the defendant I move for direction to the jury the defendant be found not guilty, for the dismissal of the charge [258—178] and the discharge of the defendant hereunder, for the reason that there is no evidence at all proving or tending to prove this defendant had anything to do with any sale or dispensing or distributing or purchasing of opium, with or without the payment of the tax required by the provisions of the Act approved December 17, 1914, as amended by Section

1006 of the Revenue Act of 1918, re-enacted by Section 1005 of the Revenue Act of 1921.

Mr. PATTERSON.—I would like to argue that.

The COURT.—We have just heard of the very sad news, of the death of Judge Vaughan, former Judge of this court, and under the circumstances we will take an adjournment of this case until 9 o'clock Monday morning, out of respect to the memory of Judge Vaughan.

(Adjourned until 9 o'clock A. M., Monday, November 13, 1923.) [259—179]

In the United States District Court, in and for the
Territory of Hawaii.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

Trial (Continued).

On Monday, November 13, 1922, at 9 o'clock A. M., all parties being present as before, the following further proceedings were had and testimony taken, to wit:

(Jury-roll called. Arther E. Davidson absent.)

The COURT.—(To jurors present in box.) Whatever may be said in argument on this motion is not part of the case, you will not consider it, and whatever ruling the Court might make will not be considered.

Mr. ULRICH.—If the Court please, I shall make what I have to say very brief, if the Court please, in connection with these motions. At this time I merely want to urge these points by way of calling to the Court's attention particularly the point as to the sufficiency of the evidence to support the two counts of the indictment.

(Argument.)

The COURT.—I took some trouble to examine the indictment. The same form has been used in this case as in others,—a number of cases extending over a certain period of years. Mere practice or continuation of an [260—180] error of course does not make it right. I think the indictment is substantially correct, and this is fastened together, three leaves. I take it this is one instrument, one document. There is absolutely no reason or purpose whatever of fastening them together and presenting them as one unless it was intended to be one, therefore the motion that the indictment be quashed and the defendant be dismissed is denied.

Mr. ULRICH.—Please note an exception.

The COURT.—An exception will be noted.

Mr. ULRICH.—Taking up Count II.

(Argument.)

The COURT.—I was first impressed with your argument, Mr. Ulrich. It seems to me under the evidence in this case, assuming that the jury will take that view, there is evidence by Mrs. Alapa that it had been delivered to her by the defendant, actually placed upon her person by him, so that being true he did have possession of it, and I suppose opium, like

anything else that is considered valuable, could not be acquired without payment for it. The motion will be denied. There may be no evidence of dispensation but it seems to me I would be bound to hold that the evidence showed possession from which purchase might be inferred.

Mr. ULRICH.—We save an exception.

The COURT.—Exception allowed.

Mr. ULRICH.—I submit next that Count I applies to [261—181] an act committed after the opium had been imported into the United States. There is nothing in the evidence to show that this opium had been imported into the United States.

Mr. PATTERSON.—One of the jurymen is absent. The ruling will have to be made in the presence of the jury.

The COURT.—The ruling likewise should be in the presence of the jury. There is one absent.

(Recess taken from 10:25 A. M. to 10:30 A. M.)

(Jury all present.)

The COURT.—Each of the motions made by counsel for the defendant are denied.

Mr. ULRICH.—Note an exception, your Honor.

The COURT.—Exception allowed.

(Mr. Ulrich, counsel for the defendant, makes statement of defendant's case to the jury.)
[262—182]

DEFENDANT'S CASE.

Testimony of Sui Chin Tai, for Defendant.

SUI CHIN TAI was called and sworn as a witness for the defendant, and testified as follows: (Through the official Chinese Interpreter.)

Direct Examination.

(By Mr. ULRICH.)

Q. What is your name? A. Sui Chin Tai.

Q. Mr. Tai, where do you live?

A. I live on School Street.

Q. You have a store, have you not, in Honolulu?

A. Yes, I have.

Q. Is your store at School?

A. On Maunakea Street.

Q. Maunakea and what?

A. Corner Maunakea and Hotel Street.

Q. It is your residence and home, that is on School and Nuuanu? A. Yes.

Q. How long have you been engaged in business here in Honolulu? A. About four years.

Q. All that time operating this store? A. Yes.

Q. Do you know Mr. Lee Choy?

A. Yes, I know him.

Q. How long have you known him?

A. I have known him for over about 10 years.

[263—183]

Q. What character of dealings, if any, have you had with Mr. Lee Choy, during the past year or so, we will say?

A. I used to buy eggs from Lee Choy.

(Testimony of Sui Chin Tai.)

Q. Buy eggs. Anything else?

A. Bananas, vegetables.

Q. Mr. Chin Tai, do you remember an evening in October when Lee Choy was arrested and taken into the police station, being October 18th. Do you remember that day? A. Yes, I remember.

Q. Now on that day when did you first see Lee Choy?

A. I thought it about after 8 o'clock I saw Lee Choy in the store.

Q. About 8 o'clock? A. Quarter to 9.

Q. That is, he came to your store about a quarter to nine? A. Yes.

Q. And what did he do when he came to your store?

A. He came in my store and asked me if I wanted some more eggs, and at the same time told me he was going down the country, and at the same time asked me if I wanted to go. I said, "Yes."

Q. Who else was in your store when he came there or while he was there that evening?

A. One other man was there in the store, by the name of Chow You Lum.

Q. Who is Choy You Lum?

A. He was working with me. [264—184]

Q. Working for you. Well, after he had come there, a little before 9, as you say, and had asked you to go to the other side of the island with him and get eggs, what did you do and what did he do, if anything, with relation to preparing to go?

A. We went down there, down the country.

(Testimony of Sui Chin Tai.)

Q. How did you go down?

A. Went down in machine,—automobile.

Q. Who drive the automobile?

A. A Chinese boy. I do not know his name. He is outside. (A person is brought to court-room door.)

Q. Is this the Chinese boy that drove you to Kaneohe that evening? A. Yes.

Q. His name is Won Tim. How did you get Won Tim to come and drive you down to the country? A. Lee Choy telephoned to him.

Q. And about what time was it that you left your store with Lee Choy and Won Tim in this automobile to go down to the country that evening?

A. After 9 o'clock that evening.

Q. As near as you can fix it, about how long after?

A. Quarter past 9.

Q. Had you closed your store yet, or were you still open?

A. I did not close the store yet. One of my men stayed in the store. I told him we were going down to the country and I left him in the store.

Q. You left then one of your men in charge of the store. [265—185] What time was that?

A. Chow You Lum.

Q. What time do you close your store in the evening?

A. That depends, sometimes after 9, sometimes 10 o'clock.

Q. When you say you left about 9:15, how do you fix that time? How do you remember that time?

(Testimony of Sui Chin Tai.)

A. We had a clock in the store.

Q. Before you left the store you noticed what time it was? A. Yes.

Q. Going down to the country, how did you sit in the automobile?

A. I was sitting in the back seat with Lee Choy.

Q. And you and Lee Choy were in the back seat and this chauffeur, Won Tim, driving? A. Yes.

Q. In going over the Pali and down to Kaneohe did you stop anywhere, or did you just go right along? A. Going straight down.

Q. Did you drive rapidly or just moderate?

A. Well, we go pretty good rate of speed.

Q. When you got over to Kaneohe where did you go? A. We went to Yim Hoon Wai's place.

Q. Who is Yim Hoon Wai?

A. Well, he is a friend of mine; also a friend of Lee Choy's.

Q. Is he the man who raises chickens and sells eggs and things like that? A. Yes. [266—186]

Q. Now, where is Yim Hoon Wai's place in Kaneohe with reference, for example, to the courthouse over there?

A. I think it is about half a mile away from the courthouse.

Q. You know, or do you know, of a little line of stores just the other side of the courthouse. Is that right,—at Kanehoe there, a lot of Chinese stores?

A. Yes, I know.

Q. With respect to those stores where is Yim Hoon Wai's place? A. No.

(Testimony of Sui Chin Tai.)

Q. What I mean is, is it close to those stores, further down the main road, or do you turn off the main road?

A. Between two stores there is a road, and we went up on that road between two stores.

Q. So that you turn off the main road and go up a little road? A. Yes.

The COURT.—Go towards the sea or towards the mountain? A. Go up towards the sea.

Q. And when you arrived at Yim Hoon Wai's place who did you find there? A. Saw Hoon Wai.

Q. About what time do you think it was when you arrived at Hoon Wai's store?

A. At that time I didn't know what time it was.

Q. Well, when you got there did you go inside in Hoon Wai's house? [267—187]

A. Yes, I went in.

Q. Did Lee Choy go in? A. Lee Choy went in.

Q. Did the driver go in?

A. No, the driver remained on his machine.

Q. Well, what did you do in Hoon Wai's store?

A. When I arrived at his place Lee Choy and I went in his house, we went inside the office and in a little while Yim Hoon Wai called Lee Choy out. When they went out I don't know what they were doing.

Q. Lee Choy went there to get eggs to sell to you, is that right? A. Yes, sir.

Q. How much was he selling these eggs to you for? A. A dollar a dozen.

(Testimony of Sui Chin Tai.)

Q. You don't know anything about how much he was paying for them? A. No, I do not.

Q. How long did you stay at Hoon Wai's place there at Kaneohe?

A. We stayed there, I think, about three-quarters of an hour or one hour.

Q. What were you doing during that three-quarters of an hour, and what were the rest of the men doing?

A. During that three-quarters of an hour I was waiting in Yim Hoon Wai's while Yim Hoon Wai and Lee Choy was engaged in conversation.

Q. Did you see them take eggs, getting chickens?

A. Yes, I did. [268—188]

Q. How many eggs did you get over there in Hoon Wai's store that night? A. 300 eggs.

Q. And how were they packed, in a small box or big box?

A. In a box, a box about that big. (Witness indicates.)

Q. Did you get anything else besides those eggs?

A. Half a dozen chickens.

Q. Half a dozen chickens; and how were the chickens packed?

A. Packed in a box with little holes for chicken heads to stick out from the box.

Q. Now, you and Lee Choy put these things in the automobile, or did you?

A. Lee Choy took them out and put them in the automobile.

Q. Where did he put the eggs?

(Testimony of Sui Chin Tai.)

A. In the machine, back, right in the back seat where we were sitting.

Q. And the chickens that were sticking out of the box.

A. The chickens were right alongside of the driver on the fenders.

Q. The running-boards?

A. Yes, right on the running-boards.

Q. All this time the driver was sitting out in the car, was he? A. Yes.

Q. When—about what time was it that you left Hoon Wai's place at Kaneohe to come back to Honolulu with the chickens and eggs?

A. I don't know what time we left there. I don't know. When [269—189] we reached to my store that was about 11 o'clock, about half-past 11 when we reached in town.

Q. It was about half-past 11 when you got back to your store? A. Yes.

Q. Well, who went back with you from Hoon Wai's store to Kaneohe?

A. Lee Choy was with me.

Q. The same driver? A. The same.

Q. Won Tim. You say that you know what time it was when you got back, it was about 11:30. How do you know that?

A. Well, when I came into my store I looked at the time.

Q. So that you had no opportunity to see the time between the time you left your store and the time you got back? A. No.

(Testimony of Sui Chin Tai.)

Q. Now did you stop anywhere coming back from Kaneohe, or did you go right back from the store? A. Came right down.

Q. And when you got to your store about 11:30 was the man that you had left in the store, in charge of the store, still there, or did he close the place up?

A. He left the store. The store was closed.

Q. When you got back to your store what did you do? A. I opened the store myself.

Q. And what did Lee Choy do?

A. Lee Choy took the eggs and the chickens into my store.

Q. That is carried them in? [270—190]

A. Carried them in.

Q. What did this driver, this Won Tim, do?

A. Lee Choy told the driver he did not need him any more, paid him off.

Q. Paid him off, and the driver left, did he?

A. Yes, after he paid him off he left.

Q. You and Lee Choy went into your store. What did you do in the store after you got in there?

A. He was putting the chicken on the scale, weighed it out, and I was taking all my cash in and putting it in the safe.

Q. How long did you and Lee Choy stay in your store there while he was packing away the chickens and eggs, and you were counting your cash, and one thing and another of that store?

A. I think we stayed there about an hour.

(Testimony of Sui Chin Tai.)

Q. You got there about 11:30. Was it after 12, would you say when you left? A. Yes.

Q. Now what did you do with respect to leaving, when you got ready to leave, as you say sometime after 12 o'clock?

A. Before we left the store we cooked about a dozen eggs and Lee Choy and I ate about a dozen eggs.

Q. After you had this little midnight lunch, what did you do with respect to leaving the store or going any place else?

A. I telephoned to a Chinese Auto Stand and tried to get a machine, was no machine there, and so Lee Choy and I [271—191] went out and got a Japanese machine. Lee Choy and I got in the Japanese machine and went right around Hotel Street and were coming home.

Q. As you were going home. You did not get home?

Mr. PATTERSON.—Just a minute. I submit the question should stand—

Q. You say you got in the Japanese machine, went around and went home. Just what did you do? Did you get home—First, where did you get the Japanese machine after having failed to raise a Chinese machine?

A. Lee Choy telephoned for the machine, but I don't know where he came from.

Q. He came from your store, and got you there?

A. Yes.

Q. You live on Nuuanu and what?

(Testimony of Sui Chin Tai.)

A. I live on School Street on the ewa side.

The COURT.—Do you know the name of the driver?

A. No, I do not.

The COURT.—Some time during the proceedings he ought to be called in and identified.

Q. When you got in the Japanese machine at your store where did you go in the machine?

A. We came along Hotel Street, turned down by the road near the palace grounds there, go right down the waterfront, then up Fort Street.

Q. How far had you gone along Fort? By the way, did you stop anywhere on that road or just go along? A. We stopped at Fort Street.

Q. Fort and what? [272—192]

A. Outside of the Bishop Bank.

Q. Outside of the Bishop Bank?

A. Hawaii Bank.

Q. Near Fort and Merchant Street; is that right?

A. Yes.

Q. I mean when you got out of your store, and took this road down to the waterfront and back, had you stopped anywhere else, anywhere until you got to Fort and Merchant Street? A. No.

Q. And then you got to Fort and Merchant Street. As you were getting to Fort and Merchant Street will you tell the jury what happened?

A. Before we get to Merchant and Fort Street we follow another machine up, and when we get near to Merchant Street we pass this machine,—we passed this machine. I saw McDuffie on the car

(Testimony of Sui Chin Tai.)

and I said, "Hello, Mack," and he said, "Stop" and we stopped there.

Q. You came up from the machine from the back and then you called out, "Hello, Mack."

A. When we stopped our machine on the corner there, he drove his machine and stopped his machine outside of the clothing store.

Q. After driving there on Fort Street how were you sitting in the automobile, where were you sitting?

A. I was sitting in the back seat on the right-hand side.

Q. Where was Lee Choy sitting?

A. He was sitting on the left. I was on the right, and [273—193] Lee Choy was on the left.

Q. And the driver in front? A. Yes.

Q. Well, after you had stopped what happened?

A. I got off, when McDuffie told me to stop I stopped and got off the machine, at the same time McDuffie got off his machine. He came toward my machine. I was walking toward his machine. We met halfway. He asked me what I wanted, if I wanted to see him. I says, "No, I thought you wanted to see me." That is what I told McDuffie.

Q. In the meanwhile what else did you see that happened around there?

A. We pulled our machine a little on the other side of McInerney's store and the revenue officer came and stopped us, put a flashlight into the machine. Then he took Lee Choy out of the machine.

(Testimony of Sui Chin Tai.)

Q. Then what did they do?

A. They took Lee Choy to another machine, they called that woman to identify Lee Choy.

Q. Now, Chin Tai, you stopped there at Fort and Merchant Street and talked to McDuffie; all the time, earlier in the evening when Lee Choy came to your store about 9 o'clock or a little before 9, you left for Kaneohe a little after 9,—between those two times was Lee Choy with you personally all that evening, as you have testified, going over to Kaneohe, coming back again, in your presence?

A. He was with me all that time.

Q. After he was taken back to where this woman was what happened? Did you go down to the police station? [274—194]

A. They put Lee Choy in McDuffie's machine, they drove down to the police station. I was following them behind.

Q. Did you make any effort to procure bail for Lee Choy?

A. I tried to bail him out that evening, but they told me I could not bail him out.

Q. Did you make any effort to do anything else for this woman, by the way of getting her a lawyer or bailing her out? A. No.

Q. Did you have any talk with the woman at all?

A. No, I do not know her.

Q. When did you next see Lee Choy?

A. I saw him next day.

Q. Were you able to get him out on bail then?

(Testimony of Sui Chin Tai.)

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

(Argument.)

The COURT.—I think that has some bearing.

(Argument.)

The COURT.—It would show his interest in Lee Choy at least. Let us get all the facts in the case we can. Objection overruled.

A. I could not get him out the next day.

Q. Do you know when it was that he was finally released, how many days it was after that?

A. I got him out at 12 o'clock; Mr. Brown prepared bonds.

Q. Got him out that day?

A. Got him out Saturday, I think, about 12 o'clock. [275—195]

Q. It was Wednesday when he was arrested?

A. Yes.

Q. You were his bondsman, were you? A. Yes.

Q. How much was the bond?

Mr. PATTERSON.—Objected to on the ground it is incompetent, irrelevant and immaterial.

The COURT.—I do not see that is material. The objection is sustained.

Q. Now, you have told us, have you, Chin Tai, as nearly as you can, everything you and Lee Choy did between 9 o'clock that evening and when you got to the police station. Is that right? A. Yes.

Cross-examination.

(By Mr. PATTERSON.)

Q. You say Lee Choy came to your store about

(Testimony of Sui Chin Tai.)

a quarter to nine that night? A. Yes.

Q. Previous to a quarter to 9 that night of the 18th what had you been doing?

A. I was in the store.

Q. You were in the store. You are sure about that? A. Yes, I am sure.

Q. From 6 o'clock that night then,—from 6 o'clock on the night of the 18th up to the time that Lee Choy arrived at your store you were in the store all the time?

A. Well, I do not stay there. I go in and out.

Q. How far had you been. How far out did you happen to go out on that night, if you went out at all? [276—196]

The COURT.—Between 6 o'clock and the time Lee Choy arrived there?

A. As far as the "Liberty News," around the corner, Sing Moe's store, right outside my store.

Q. You were not more than a block away then, as I understand?

A. From my store to "Liberty News," a little over a block.

Q. You were not over two blocks away?

A. No.

Q. What time did you and Lee Choy arrive on to the police station after you had run on to McDuffie that night?

A. I think that was near 1 o'clock in the morning.

Q. Now, I want you to fix an hour that you can swear positively that it was not later than, that

(Testimony of Sui Chin Tai.)

particular hour that you and Lee Choy and McDuffie went to the police station that night?

A. I did not have a watch in my hand all the time. I think it was about one that time, near one o'clock.

Q. Was it earlier than one o'clock?

A. I could not say because I did not have the watch in my hand.

Q. Are you positive that it was not earlier than half-past 12?

Mr. ULRICH.—Objected to as not material.

The COURT.—I think the cross-examination is proper. Great latitude should be allowed, until he shows he cannot fix the time. He has the right to put this question at least. [277—197]

A. I am positive it was after half-past 12.

Q. You are positive it was later than half-past 12?

A. Yes, I am positive it was after half-past 12.

Q. Then between the hours of 6 P. M. on the 18th day of October, 1922, and half an hour after midnight on that same day, you were not in the police station in Honolulu?

The COURT.—Get that right, between 6 o'clock and 12:30.

A. I was down to the police station half-past 7 that evening. Somebody told me a man was arrested down to the police station. I was going down to bail him out. When I arrived down there there was nobody there.

Q. Just what did you mean when you said a minute ago, when you said you were not two blocks

(Testimony of Sui Chin Tai.)

away from your store after 6 o'clock that night?
Just what did you mean?

A. Well, I did not remember that incident until you called my attention to it.

Q. So you remember now that 7:30 the night of the 18th of October, 1922, you were down to see about bailing a friend out, is that correct?

A. Yes.

Q. Are you positive about that? A. Yes.

Q. Now, after 7:30 that night did you go down to the police station again? A. No.

Q. So now you can testify positively that on the night of the 18th of October, 1922, between the hours of 7:30 P. M. [278—198] and a half an hour after midnight of the same date that you were not near the police station in Honolulu?

Mr. ULRICH.—I do not know what he means by "near." The question is not very fair. A. No.

Q. During those hours you were not in the police station either, were you?

The COURT.—You mean from 7:30 to 12:30?

Mr. PATTERSON.—Yes.

WITNESS.—No.

Q. Who was this friend you were going to bail out that night?

A. Well, I don't know, when the party telephone to me, told me to go down to the police station and bail a man out; I asked him who was the man arrested and he told me I know the man when I arrive down at the police station.

Q. Did you find the man? A. No, I did not.

(Testimony of Sui Chin Tai.)

Q. There was nobody arrested? A. No.

Q. Did you talk to anybody when you were down there?

A. I came down to the police station as far as the corner there; I came as far as Merchant and Nuuanu Street, and I met a Chinaman by the name of Lum Tip, the one who telephoned to me; he told me there was nobody down there.

Q. Did you go on down to the police station?

A. No, I did not go down to the police station from the corner. [279—199]

Q. Then we will go back again. From the hour of six o'clock on the evening of October 18th, the hour of 6 P. M., up to half an hour after midnight on the same day you were not in the police station?

Mr. ULRICH.—I would not object if he had not gone over it so many times. I object on the ground that it is not proper cross-examination to take this witness over a period of time that was not covered by direct examination.

The COURT.—I think it is proper cross-examination, particularly in view of this last answer. The cross-examination extends through the testing of his credibility as well as material facts. Objection overruled.

Mr. ULRICH.—Exception.

A. No.

Q. Then you were mistaken awhile ago when you said you went down to the police station at 7:30 that night?

A. Well, I did not go in the police station but I passed the police station that evening.

(Testimony of Sui Chin Tai.)

Q. Where is Merchant Street, is that the street that runs in front of the police station? A. Yes.

Q. Do you know Arthur Brown? A. Yes.

Q. Did you ask Arthur Brown to represent this woman back here as her attorney? A. No.

Q. You are positive of that? A. Positive.
[280—200]

Q. What time did you and the defendant leave for Kaneohe that night?

A. We left my store quarter past nine.

Q. And was this a business trip over to Kaneohe?

A. Yes, a business trip, to buy eggs from him.

Q. And you went over there with Lee Choy. What kind of automobile was this?

A. I do not know what kind; I could not say what kind of machine. I know the driver.

Q. Was it a passenger automobile? A. Yes.

Q. Was it a big automobile?

A. Passenger automobile, seven-seated machine.

Q. And you and Lee Choy went by yourselves, you two and the driver? A. Yes.

Q. And you bought 300 eggs at a dollar a dozen from Lee Choy? A. Yes.

Q. And how much did you pay for the chickens?

A. I did not buy the chickens from him; he kept the chickens in the rear of my store and the next day I sold the chickens for him.

Q. How much did you sell them for?

A. I sold for 75¢ a pound for him.

Q. How much did they weigh?

A. Six chickens, weighed 24 pounds.

(Testimony of Sui Chin Tai.)

Q. You are positive about that? [281—201]

A. Yes.

The COURT.—Was this 75¢ a pound for dressed chickens or live chickens? A. Live weight.

Q. Is that the price these chickens generally sell for, 75¢ a pound live weight? A. Yes.

Q. Who did you sell those chickens to?

A. I sold that to my customer. I kept two myself.

Q. You don't know which particular customer you sold it to?

A. Of course I didn't pay much attention to who were they.

Q. Did you and Lee Choy have any other business over in Kaneohe that night? A. Not there.

Q. Do you know whether Lee Choy had any other business or not? A. No.

Q. Do you know how far it is to Kaneohe?

A. No, I do not.

Q. About how far?

A. Well, I don't know exactly how many miles; I think about 10, or 8 miles, I would say.

Q. How many times have you been over at Kaneohe? A. Twice.

Q. Only twice in your lifetime?

A. I went down Yim Hoon Wai's, I believe, but I went down many times before that.

Q. Are you pretty well acquainted? [282—202]

A. I had a rice plantation down at Heeia. Just sold it last year.

(Testimony of Sui Chin Tai.)

Q. How long have you known this Yim Hoon Wai?

A. I have known him about ten years. I knew him when he was in town here.

Q. Are you a very good friend of his?

A. Well, not exactly; we know each other.

Q. Have you ever been interested in business with him? A. No.

Q. Did you ever loan any money to him?

A. No.

Q. Did he ever loan any money to you? A. No.

Q. Did he ever work for you? A. No.

Q. Does he deal with you? A. No.

Q. Any relation of yours? A. No.

Q. How long did you stay over to his house that night? A. I think about an hour.

Q. How much did Lee Choy pay him for the eggs? A. I do not know.

Q. How much did he pay him for the chickens?

A. I do not know.

Q. You didn't have any talk with Lee Choy about that at all? A. I didn't. [283—203]

Q. This night he came down to your store he told you he was going over after your eggs?

A. Yes.

Q. And he asked you if you wanted to go along?

A. Yes.

Q. And you said yes and away you went?

A. Yes.

Q. Now, how long have you known Lee Choy?

A. I have known him about ten years.

(Testimony of Sui Chin Tai.)

Q. Do you know his wife? A. Yes.

Q. Does he know your wife? A. Yes.

Q. Do you visit each other? A. Yes.

Q. Friendly with one another? A. Yes.

Q. What does he do? What is his business?

A. He delivers, goes down to the boat, vegetables down to the boat.

Q. Who does he work for?

A. He is working for Lee Chuck. Lee Chuck is Lee Choy's uncle. Lee Choy is there in that store with his uncle.

Q. After you left your place, after you had returned from Kaneohe, you got in the Japanese automobile, you say? A. Yes.

Q. What is the name of that Japanese?

A. No, I don't know. [284—204]

Q. How much did you have to pay this Chinaman over and back in this automobile?

A. I don't know how much his fare. I didn't pay him. Lee Choy paid him.

Q. You don't know the name of this Japanese?

A. No, I didn't.

Q. Would you know him if you saw him?

A. I am not positive because that night when I arrive in his machine was night-time.

Q. Have you seen him since that time? A. No.

Q. You are positive about that?

A. I am positive.

Q. Where is his stand?

A. I don't know. Lee Choy called him by the telephone.

(Testimony of Sui Chin Tai.)

Q. And when you got in his automobile where did you go?

A. We drove on on Hotel Street, right on the other side of the Palace grounds, then right down to the waterfront, then up to Fort Street.

Q. You went down the waterfront to pier 7, didn't you, and Lee Choy?

A. Yes, we passed pier 7 on our way up.

Q. You know where pier 7 is, don't you?

A. Well, I don't know number 7. We came down on this next street here, called Richard Street, and go right down to the waterfront, right along the waterfront and up Fort Street.

Q. Didn't you go down—you know the road in front of the piers, down there?

A. Well, I know the road opposite the pier but I don't [285—205] know the name of the road.

Q. Didn't you go down the road and turn completely around and go back up town?

Mr. ULRICH.—I don't think the question is intelligible. Do you mean he came around and came back on the same street?

Mr. PATTERSON.—I think it is proper the way it is asked. I asked him if he did not go down and turn around.

The COURT.—You mean at the point he reached?

Mr. ULRICH.—I don't. Does he mean he came back and retraced his steps?

The COURT.—As he drove down he reached a point there. At that point did you not come right back. It may have been in better form. The ob-

(Testimony of Sui Chin Tai.)

jection will be overruled. Mr. Patterson explained that he meant at that particular point.

Q. I mean turn completely around, not to the right or left?

A. No, he did not. He went right straight on the waterfront road and up to Fort Street.

Q. What is your business, Mr. Ching Tai?

A. Running a store.

Q. You are known as a professional bondsman, too, are you not? A. Yes, I am.

Q. You go bonds on most of the opium cases that come up in this court, don't you?

Mr. ULRICH.—I think I will object to it, if the Court please. [286—206]

The COURT.—Objection overruled. We have a right to know all about his business.

A. Yes, they call me, I go on their bonds.

Q. Did you ever bond anybody at the request of Lee Choy? A. No.

Q. Didn't Lee Choy come and see you on the night of the 18th in order to go bonds on people that had been arrested that night?

A. No, I could not—he could not come. He was locked up in the police station. How could he get me?

Q. Before that? A. No.

Q. Were you out riding with Lee Choy before this night? A. Once in awhile.

Q. This is the first time you ever went on any egg purchasing expedition, wasn't it?

A. That is the first time.

(Testimony of Sui Chin Tai.)

Q. Where did you say your store was?

A. Maunakea Street and Hotel.

Q. And where do you live?

A. On School Street, this side of the Insane Asylum.

Q. And how far is that from your store?

A. I think about a mile.

Q. How do you go to and from your house?

A. On School Street, down to Liliha Street.

Q. Where does Lee Choy live?

A. He lives on Kinau Lane on Vineyard Street. [287—207]

Q. Both of these residences are up on the upper mauka side of your store, are they not?

A. Yes.

Q. What did you call this Japanese taxi driver for that night?

A. Well, we tried to get a Chinese automobile that night; we could not get it.

Q. What did you call them for,—any automobile for?

A. Well, I was going to get a machine to take me home.

Q. That is what you wanted a machine for, is it?

A. Yes.

Q. Why didn't you go home?

A. Well, it was very warm that night. We were going out to take a little fresh air.

Q. The freshest air you could find was down towards pier 7, is that correct?

(Testimony of Sui Chin Tai.)

A. Yes, that is all the way down it was fresh air.

Q. Your idea of fresh air in Honolulu is down Richards Street to pier 7 and back up again, up Fort and Merchant, is that the way you go when you go out riding for fresh air?

Mr. ULRICH.—Objected to.

The COURT.—I think it is proper. I will permit the question on cross-examination.

A. Well, I don't.

The COURT.—You found plenty of fresh air up the Pali didn't you?

A. Of course I go any place that I feel like it. [288—208]

Q. You found plenty of fresh air up the Pali, didn't you?

A. We had that fresh air already when we came down from the Pali. No use going back there again.

Q. Is there any fresh air out where you and Lee Choy live, out in that direction?

A. Well, fresh air all around.

Q. Was Lee Choy looking for fresh air, too, this night when he was riding?

Mr. ULRICH.—Objected to. It is perfectly easy to insinuate and make argument by repeating three or four different times insinuations, suggestions, in the manner in which this thing is being done now.

WITNESS.—I am not satisfied you ask me a question like that. I was subpoenaed to come

(Testimony of Sui Chin Tai.)

down here to testify. I was not here to answer questions like that.

The COURT.—As long as the Court holds the question is proper it is your duty to answer it.

A. Yes, there is fresh air, in fact fresh air all around.

The COURT.—Fresh air all around, Mr. Paterson.

(Witness produces subpoena.)

Q. When did you get that subpoena?

A. That was given to me this morning by the officer.

Q. Is that the first subpoena you have gotten in this case? A. Yes.

Q. Were you up here on the other days during the course of this trial? Did you come up here for fresh air on those days? [289—209]

A. No, I was not here for fresh air. I was up here to see Brown. He had a lot of cases up here.

Q. You have been here every day during the course of this trial without a subpoena, haven't you?

Mr. ULRICH.—He has not, if the Court please, any—

The COURT.—There is nothing wrong with that question, Mr. Ulrich.

A. Not every day. Once in awhile I come up here. I have a lot of Chinese to bail out during the last opium cases. I come up here to see whether they come up or not.

(Testimony of Sui Chin Tai.)

Q. You were up here last monday morning when the case was started, wasn't you?

A. Yes, I was.

Q. Was there any opium cases coming up here Monday morning that you were interested in?

A. Yes, Bung Choy's case was coming up that day, but when I come up the case was not ready yet.

Q. So you took a seat in the front row here as an interested spectator, didn't you? A. Yes.

Q. And several times during the progress of this case you have been up here, haven't you?

A. Yes.

Q. On Monday didn't they tell you to stay out of here because you were going to be a witness in this case?

Mr. ULRICH.—I object to this, if the Court please, as improper *redirect* examination.

The COURT.—I think the objection will be sustained. The [290—210] Court made an order applicable to all witnesses.

Q. On this particular night after you had obtained the services of this Japanese driver you drove from your store over to Richards Street,—or over to Hotel Street, down Hotel Street to Richards Street and down Richards Street to the wharf; is that correct? A. Yes.

Q. And from the wharf up to Fort Street and then up Fort Street to Merchant Street?

A. Yes.

Q. And you went no place else with this Japanese driver that night? A. No.

(Testimony of Sui Chin Tai.)

Redirect Examination.

(By Mr. ULRICH.)

Q. When you say you went to the wharf you mean you had any particular wharf in mind? Did you stop at any wharf?

A. No, I did not stop at the wharf, but go right straight on the road right in front of the wharf.

Q. Now, as to being down to the police station earlier in the evening, was it an uncommon thing for you to be called down there by telephone to bail people out at the police station?

A. No, that is not uncommon, because people used to call me up every time.

Recross-examination.

(By Mr. PATTERSON.)

Q. Wasn't you afraid this trip over to Kaneohe might [291—211] interfere with some of your bail-bond business?

Mr. ULRICH.—Objected to—

Mr. PATTERSON.—I will withdraw the question. I will ask the Court for leave to further cross-examine. I think counsel has in his redirect *has* taken up the proposition of this bail-bond business, about being called down. That is why I asked the question.

The COURT.—I will permit the question then:

A. Well, I am not the only bondsman. If they can't get me they can get somebody else.

(Witness excused.)

Testimony of Hoon Wai, for Defendant.

HOON WAI, was called and sworn as a witness for the defendant, and testified as follows: (Through the official Chinese Interpreter.)

Direct Examination.

(By Mr. ULRICH.)

Q. What is your name? A. Hoon Wai.

Q. Where do you live, Mr. Hoon Wai?

A. I live down Kaneohe, Koolou.

Q. What is your business? What do you do down there?

A. I am a butcher, raising pigs and chickens.

Q. Do you know Lee Choy sitting here?

A. Yes.

Q. Do you know Mr. Chin Tai?

A. Yes. [292—212]

Q. How long have you known Lee Choy?

A. I have known Lee Choy about two or three years.

Q. What has been the character of your acquaintance or dealings with Lee Choy during that time?

A. He was,—you know when he, Lee Choy, stayed at Kaneohe he used to come down to my place buy hogs from me, also buy chickens and eggs.

Q. Do you remember the night of October 18th of this year? A. Yes, I remember.

Q. Do you remember seeing Lee Choy on that night?

A. Yes, I know he was out at my place.

(Testimony of Hoon Wai.)

Q. At what time of the night did he get to your place?

A. I think about ten o'clock. I went out that evening and came back about a quarter to ten or ten o'clock when they came.

Q. Where had you been?

A. Went out to store at the same time to buy a little stuff.

Q. Now who was at your store when you came? Did you have a house?

A. I had a butcher-shop. That night when they came they came into my house.

Q. Now, was there anyone else there but you when they arrived?

A. Nobody else but myself.

Q. Now, who came to your store that night about ten o'clock? [293—213]

A. Ching Dai and Lee Choy came to my house, not store.

Q. What did they do or did either of them do when they came to your house?

A. They came and asked me they wanted to buy some eggs or chickens, which they always did.

(12:15 P. M. An adjournment was taken until Tuesday, November 14, 1922, at 9 o'clock A. M.)
[294—214]

(Testimony of Hoon Wai.)

In the District Court of the United States, in and
for the Territory of Hawaii.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

On Tuesday, November 14, 1922, at 9 o'clock A. M.,
all parties being present as before, the following
further proceedings were had and done and testi-
mony taken:

(Jury all present.)

HOON WAI, resumed the stand for further ex-
amination, and testified as follows: (Through the
official Chinese Interpreter.)

Direct Examination (Continued).

(By Mr. ULRICH.)

Q. Yesterday you were testifying about a visit
made to your place by Chin Dai and Lee Choy on
the night of October 18th of this year. How do
you place that date as October 18th?

Mr. PATTERSON.—I object to the question
upon the ground that it calls for a specific date. I
don't remember any where in the evidence where
the witness has voluntarily said this was on the
night of the 18th.

The COURT.—I am not sure whether he stated
that or not. You might ask him now what date of
the month it was. [295—215]

(Testimony of Hoon Wai.)

Q. You have testified about a visit to your place at Kaneohe on a certain night made by Mr. Chin Tai and Mr. Lee Choy on which occasion Lee Choy got some eggs and chickens at your house. What date was that, if you know? A. October 18, 1922.

Q. How do you fix the date as October 18, 1922?

A. Well, I am a business man down there. I put down in my book dates.

Q. Kept a record of this, did you?

A. Yes, I kept a record.

Q. Have you that book with you?

A. Yes, I have.

Mr. PATTERSON.—I object.

(Argument.)

The COURT.—I understand the rule of evidence. I suppose this is a book of accounts. That is only admissible in evidence between parties to the transaction, not between strangers. It is between parties. Here is a case between the United States of America and Lee Choy, strangers to the transaction.

(Argument.)

The COURT.—I did not quite understand what Mr. Ulrich's purpose was.

Mr. ULRICH.—First that he might refer to the memorandum; second, we offer the book in evidence to show that they are records kept in the regular course of business, to test the authenticity of the record. If it is true [296—216] that this man has been making records regularly, contemporaneous with these transactions, it is right that the

(Testimony of Hoon Wai.)

jury should know, as to whether or not they were over there on this particular night.

The COURT.—Of course, I understand you don't object to the book being handed to the witness. It appears there is no necessity of using the book for that purpose. He has already testified to the date. The book may be offered for identification.

Mr. ULRICH.—He testifies the book contained the record that the date showed the transaction taking place on that night.

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial, as a foundation for the introduction of improper evidence, and objected to as incompetent, irrelevant and immaterial for the reason, if your Honor please, that if the question is answered in either way the book is not properly admissible in evidence in this case.

The COURT.—I am inclined, Mr. Ulrich, to take that view. It seems to me if the book is not admissible for one purpose it certainly is not admissible for any other purpose. It cannot be admitted for showing an obligation between strangers. You disclaim any intention of offering it for that purpose.

Mr. ULRICH.—It may be received for identification?

The COURT.—I will permit it to be identified as the book. You may answer that question, "Is this the book?"

WITNESS.—Yes. [297—217]

(Testimony of Hoon Wai.)

Mr. ULRICH.—Now, if the Court please, I will offer the book and take the Court's ruling. I offer a record in evidence, made contemporaneous with the transaction which took place on the night of October 18th.

Mr. PATTERSON.—Alleged to have been made in October 18th. I object to the offer upon the grounds it is incompetent, irrelevant and immaterial.

The COURT.—The objection will be sustained.

Mr. ULRICH.—The book may be marked for identification. We except to the ruling of the Court in refusing to admit the book in evidence.

The COURT.—Exception allowed.

Q. Mr. Hoon Wai, you say that Lee Choy and Chin Tai were at your place on the evening of October 18th. Can you say about how long they were at your place?

A. He stayed there either three-quarters of an hour or one hour.

Q. Tell us how many eggs you sold to Lee Choy that night?

A. I sold three hundred eggs to Lee Choy.

Q. How many chickens? A. Six chickens.

Q. Did Lee Choy pay you for those eggs that night?

A. He gave me fifty dollars; five, ten-dollar bills.

Q. Was that in payment for what you gave him; or was it *selling* an obligation which he had been owing before?

(Testimony of Hoon Wai.)

Mr. PATTERSON.—That is objected to on the ground it is leading. [298—218]

The COURT.—Objection overruled.

A. He owed me some money before. The fifty covered some money before and money that night.

Q. Does it appear from that book you saw a moment ago what that was owing for, the whole fifty dollars?

The COURT.—If that gives the date? If the books show that?

Q. (By the COURT.) Does the book show the debt?

A. The book stated he gave me fifty dollars that night, and he still owe me over ten.

Q. (By the COURT.) What I mean is, it would appear from your book how your account stood? Not the date.

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial, and as referring to something that is not in evidence in this case, and not admissible in this case.

The COURT.—That is what I stated, he should not give the date. The witness has said the fifty dollars was payment on an account incurred before.

Mr. ULRICH.—I want to get it in again. It simply shows the probability and the reasonableness of the evidence that he did go down there.

The COURT.—I think he has shown that by his evidence. The objection will be sustained.

Mr. ULRICH.—We will note an exception.

(Testimony of Hoon Wai.)

Do I understand the Court will not allow evidence on that?

The COURT.—He has stated he owed him something before [299—219] going down there that evening, this fifty dollars was full payment of that and partial payment on the other, leaving a balance still due of ten dollars.

Q. As near as you can remember, Mr. Wai, when was it that Chin Tai and Lee Choy left that place that night to come back to Honolulu?

A. They left my place after 10 o'clock.

Q. Well, about what time did you say they got to your place?

A. They were at my place either a quarter to ten or 10 minutes to ten.

Q. You testified they stayed there one-half or three-quarters of an hour. Did I understand the witness to say they arrived at the place a quarter to ten?

A. A quarter to ten or ten minutes to ten.

Q. They stayed there three-quarters of an hour or an hour? A. Yes.

Q. Bearing in mind they stayed there from three-quarters of an hour to an hour, when you say 10 o'clock is the time they left, can't you fix that a little more definitely?

Mr. PATTERSON.—Objected to as leading. The witness testified as to what time they left.

The COURT.—I will permit the question. Answer the question.

(Testimony of Hoon Wai.)

A. I think it was about 5 minutes to 11 they left my place.

The COURT.—Did you have a clock?

A. Yes, I have a clock in my house, but I didn't have [300—220] a watch in my pocket.

Q. And that is all you know about Chin Tai and Lee Choy on the night of October the 18th?

A. Yes, sir:

Q. How long did you say you had been selling chickens and eggs and pork over there at Kaneohe?

A. Eleven years.

Cross-examination.

(By Mr. PATTERSON.)

Q. Now, you testified it was five minutes to 11 when the defendant and Chin Tai left your place. Are you pretty sure about that time?

A. Yes, I am sure.

Q. Did you look up to the clock as they were leaving?

A. Right after they left I went in the parlor to look at the time before I locked up my door to go to bed.

Q. Do you remember looking at the time that night? A. Yes.

Q. When you arrived at the parlor and looked at the time what time did the clock say?

(Conversation between witness and Interpreter in Chinese.)

The INTERPRETER.—I asked him when he went to the parlor and when he looked at the time—

(Testimony of Hoon Wai.)

The COURT.—Tell him to answer the question. We do not want him talking about other matters.

A. A few minutes to 11.

Q. Was it 10 minutes or 15 or 3 or 2 or 1 minute?

A. Four minutes to 11.

Q. You are sure about that? [301—221]

A. Yes, I am sure.

Q. You are sure it was not three or five; just exactly four minutes to 11? A. Four minutes.

Q. Did you look at the clock when Chin Tai and Lee Choy arrived?

A. Yes, I looked at the time.

Mr. ULRICH.—I have to challenge the interpretation on the question just before that. My Chinese adviser said the witness said four minutes but it was only after the suggestion of four minutes from the interpreter that it came out four minutes. The witness testified a “few minutes,” not “four minutes.”

The INTERPRETER.—He said a few minutes at first, then after Mr. Patterson—

The COURT.—Ask him again.

Mr. PATTERSON.—I will reframe the question. It was exactly four minutes to 11 when you looked at the clock after Chin Tai and Lee Choy had left, wasn't it?

The COURT.—Answer the question.

A. Exactly four minutes.

Q. You are sure it was not three and you are sure it was not five? A. Four minutes to 11.

(Testimony of Hoon Wai.)

Q. Would you be willing to concede it might have been four minutes and a half or three minutes and a half to eleven?

A. No, the time was four minutes to 11. [302—222]

Mr. PATTERSON.—I think he is pretty certain on that point, your Honor. The Interpreter was correct before.

Q. So you looked at the clock when they came in that night, too? A. Yes.

Q. And what time was it then?

A. A quarter past 9 or 20 minutes past 9 when they arrived my place. I didn't look at the time that time.

Q. It was a quarter past 9 or 20 minutes past 9. When was the time that you looked at the clock then?

A. When they arrived my place, sitting on the chair, then I went inside get tea, and when I gave them tea to drink that is the time I looked at the time.

Q. And what was the time then?

A. About a quarter past 9.

Q. About a quarter past 9, is that correct?

A. Quarter past 9.

Q. That is when Chin Tai and Lee Choy arrived at your place? A. Yes.

Q. They were in the house and you went into your room and looked at the clock and said a quarter past 9?

A. They were sitting on the veranda, I went in the house and looked at the time.

(Testimony of Hoon Wai.)

The COURT.—Why did you go in the house and look at the time?

A. Well, I have a family living in the house with me. I am on the veranda. I have a room on the veranda. [303—223]

The COURT.—Why did you go inside to see what time it was?

A. When I went inside to bring the tea-pot out and at the same time I looked at the time.

Q. And you said it was 15 or 20 minutes after 9. Are you positive now as to the exact time that it was?

A. Yes, I am positive that it was a quarter past 9, because I have another clock in the kitchen that shows a quarter past 9.

Q. So you looked at the two clocks then?

A. I looked at both clocks; one clock is a few minutes faster than the other.

Q. You are absolutely positive about that?

A. Yes.

Q. This was on the night of the 18th of October?

A. Yes.

Q. Your clocks are the same as the clocks in Honolulu?

A. I kept my time from the telephone operator.

Q. You keep your clocks pretty close to the right time, do you? A. Yes.

Q. Now what did you mean a minute ago when you said that Lee Choy and Chin Tai arrived at your house at a quarter to 9 or 10 o'clock on the night of the 18th of October,—I mean a quarter to 10 or 10 o'clock?

(Testimony of Hoon Wai.)

A. What do you mean? No, I didn't state that.

Q. In answer to Mr. Ulrich's question you testified that Chin Tai and Lee Choy arrived at your house a quarter to ten [304—224] or ten o'clock? Were you testifying falsely then or are you testifying falsely now?

A. I didn't make that statement. I told when they left my house, near that time.

Q. When they left your house then it was a quarter to 9 or ten o'clock, is that right? A quarter to ten or ten o'clock?

A. They left my place near 11 o'clock.

Q. Well you testified a minute ago to that. You testified awhile ago when Mr. Ulrich, the defendant's attorney, was asking you some questions, that it was a quarter to ten or ten o'clock when these people arrived at your house. Now, was that correct? A. Yes, that is correct.

Q. They arrived there then at your house about a quarter to ten or ten o'clock?

A. Oh, yes; arrived at my place after 10 o'clock. When they left my place near 11 o'clock.

Q. They arrived at your place after 10 o'clock?

A. They arrived my place a quarter past 10, and left my place near 11 o'clock.

Q. You are sure it was 15 minutes after ten?

A. Yes.

Q. That is when they arrived then? A. Yes.

Q. What did you mean when you said a moment ago that they arrived at your place at a quarter after 9 o'clock?

(Testimony of Hoon Wai.)

The COURT.—Or 20 minutes. [305—225]

Q. Or 20 minutes after 9?

A. I misunderstood that time. I misunderstood the question that time.

Q. Didn't you hear me repeat that question about four or five times?

A. I could not hear very good.

The COURT.—You now say you are sure he arrived at your place at a quarter past 10, is that correct? A. Yes.

The COURT.—And that he stayed at your place about three-quarters of an hour, or one hour, is that correct? A. Yes.

Q. You are positive of that now? A. Yes.

Q. Did you have any trouble hearing the interpreter asking these questions a minute ago?

A. Before that I misunderstood him; he misunderstood me; now he understands me.

The COURT.—You say you are sure they arrived at your place a quarter past 10 and stayed there three quarters of an hour or an hour. Are you also sure they left there at 4 minutes of 11?

A. They left my place four minutes or five minutes, about near that time.

Q. Did you put these times down in your account-book? A. No, I did not.

Q. You remember this distinctly from your memory? A. Yes, I marked out my times.

Q. When you were testifying about their leaving a minute [306—226] ago, a little while ago, you made the direct statement to your attorney that they

(Testimony of Hoon Wai.)

arrived at 9:45 or 10 o'clock. What did you mean by that?

A. Well, what I said before I have forgot of already.

Q. You have forgotten now about it?

A. Well, afterwards everything you asked me is correct.

Q. Now, which is correct, tell us again?

A. In answering the questions of my direct examination some are right, some are wrong; answering your questions they are correct.

Q. All the questions you have answered to me are correct. Why did you answer the questions wrongly when your attorney asked you?

A. Well, I make mistake of the time. I misunderstood.

Q. You may be mistaken altogether about this time, isn't that correct?

A. No, I am positive this last time I fixed it.

Q. Didn't Lee Choy check your memory up in regard to the time that he arrived there?

A. No, he did not.

Q. And from the night of October 18th up to the time you became a witness in taking the witness-stand this morning, up to the time you took the witness-stand in this case, you have never said anything about the time that these people arrived and departed to anyone, is that correct? A. No.

Q. This is the first time it has ever been mentioned? A. Yes. [307—227]

(Testimony of Hoon Wai.)

Q. You are positive Lee Choy has never said anything about it? A. No.

Q. Never talked about it with Mr. Ulrich?

A. No.

Q. Never talked about it with Mr. J. Donovan Flint?

A. He questioned me, told me to tell the truth. I told the truth.

Q. He told you to tell the truth. Did he come over to your house over there?

A. Why, I went down to his office. He sent for me.

Q. Since I have been talking to you you have been telling the truth about the time, is that correct?

A. Yes, sir.

Q. Do you remember you told me about the two clocks you had over in your house? A. Yes.

Q. And do you remember you told me that you talked to the telephone operator about them, that you got the time from the telephone operator?

A. Yes.

Q. You remember that. And do you remember the time when you went off the porch to get tea for Chin Tai and Lee Choy? A. Yes.

Q. And you remember telling me it was 15 minutes after 9 o'clock when you— Do you remember telling me that by these two clocks you looked at at that time it was 15 or 20 minutes after 9 when you went in after this tea? [308—228]

A. No, quarter past ten.

Q. You didn't say anything about 9 o'clock?

(Testimony of Hoon Wai.)

A. No, I did not. Well, maybe I did state it, if I did state it it is my mistake.

Q. When you told Mr. Ulrich that they arrived at 9:45 or 10 o'clock that was not true, was it?

Mr. ULRICH.—This matter has been gone into three or four times.

The COURT.—I think his attention has been called to that sufficiently.

Q. Now, how many acres of land do you own at Kaneohe?

A. I have seven acres altogether, four different places.

Q. You have seven acres altogether?

A. Yes, with the exception of my house.

Q. Are you a butcher by trade? A. Yes.

Q. Do you raise pigs?

A. Yes, raise pigs, have pig-pens there.

Q. That is your chief business, raising pigs for the butcher-shop?

A. Raising chickens, planting vegetables and also rice field.

Q. Now on these seven acres how many acres are there in the rice field.

A. I use over three acres, bananas and rice field.

Q. How much in vegetables?

A. Well, this year a little over an acre planted in rice, right after planted rice planted vegetables, and after that planted rice. [309—229]

Q. Then there is a little over three acres that you use for that purpose?

A. About one acre, vegetables and rice.

(Testimony of Hoon Wai.)

Q. About $2\frac{1}{2}$ acres that is continually planted in rice and bananas, is that right?

A. Two acres planted in bananas and papaias.

Q. How many pigs do you have over there?

A. I had about 24 or 25 more left, some die before.

Q. Do you buy meat from the outside people for your butcher-shop? A. No, no meat, just pork.

Q. Do you buy pork from outside people?

A. No.

Q. You just sell pork that you raise, is that correct?

A. I sell some of my pigs, and sometimes I bought pigs from other peoples.

Q. Do you buy any pigs to furnish to the Honolulu markets?

A. I sold some pigs to C. Q. Yee Hop, worth about over a thousand dollars.

Q. Do you buy pigs and other produce from your neighbors and other farmers over there and sell it to people in Honolulu? A. Yes.

Q. You do that, do you?

A. Yes, bought and sold.

Q. How long has it been since you bought any produce from your neighbors to sell in Honolulu?

A. It was about a year or more.

Q. And for the past year you have bought no produce from [310—230] any of your neighbors to sell to any one in Honolulu?

A. Since then I didn't bought any to bring in

(Testimony of Hoon Wai.)

town, or sell it; I bought it to keep it out at my place.

Q. How many chickens have you on this place?

A. I had 130 chickens raised at the pig pens, and I had about 60 or 70 at my home.

Q. How much did Lee Choy pay you for these eggs that he got from you there?

A. I sold to him for twenty for one dollar.

Q. Twenty for one dollar, is that correct?

A. Yes.

Q. How much did you get for the 300 eggs?

A. \$15 for 300 eggs.

Q. How much did he pay you for the chickens?

A. He paid me 60¢ a pound.

Q. Did you weigh the chickens over there before you left?

A. No, I didn't weigh it out to my place, I told him to weigh it in town.

The COURT.—How were you able to make a charge for the chickens on your book if you didn't know how much they weighed?

A. I came out the 3d day and asked Lee Choy and he told me the weight of the chickens.

Q. You came out the 3d day?

A. The 2d or 3d day I came out in town.

Q. You mean by that the 20th or 21st, is that correct?

A. On the 20th, one day afterwards, on the 20th.

Q. It was not the next day after the night they were over there, it was the second day, is that correct? [311—231] A. The second day.

(Testimony of Hoon Wai.)

Q. You are positive about that? A. Yes.

Q. And that was on the 20th day of October that you came into town?

A. I do not remember the date. When I came in town here I didn't see Lee Choy.

The INTERPRETER.—I told him that was not the answer to the question, it was what date did he come in town.

The COURT.—Always get what he says; we will hear it nevertheless. So in interpreting give us all he says. It is not for the Interpreter to determine what is material and what is not.

Q. Tell the witness to go ahead and tell the story.

The COURT.—When it goes to great length you might stop him for the purpose of interpreting what he has said. The Interpreter is not to determine what is material and what is immaterial.

Q. So the second day after Lee Choy and Chin Tai were over to your house you came over to Honolulu? A. I did not come the second day.

Q. What day did you come?

A. I did not remember the date I came to town here; when I came in town I asked Lee Choy how much the weight, how many pounds them chickens is, and he paid me the price of my chickens.

Q. Now, a minute ago you testified that you came in on the second day. Is that true or not?

A. No, I did not come on the second day; it was a few [312—232] days after I come to town.

Q. What did you mean awhile ago when you said it was on the second day?

(Testimony of Hoon Wai.)

A. The next day I was busy, I could not come in town. At the same time I forget.

Q. The next day you were busy and could not come to town, is that correct? A. No.

Q. Was it the day after that that you came to town?

A. The next Monday I came; it was next Monday I came in town.

The COURT.—What day of the week was it that Lee Choy and Chin Dai were at your place?

A. They came to my place Wednesday evening.

The COURT.—The following Monday you came to town to see about your chickens?

A. Yes, Monday I came in town.

Q. What did you mean a minute ago when you said it was the second day that you came into town?

A. Well, I make a mistake. I did not come in town the next day.

Q. You are positive about that now?

A. Yes, I am positive that I did not come in town?

Q. What is your reason for making that statement then?

Mr. ULRICH.—I object. He has asked him what he meant by saying it.

The COURT.—I suppose he has no reason for it. I think the objection will be sustained. There is not anyone I suppose who will make a mistake on purpose. [313—233]

(Testimony of Hoon Wai.)

Q. The following Monday you came in town then, was it? A. Yes.

Q. And what date was that?

A. Monday was on the 22d.

Q. What time did you leave Kaneohe that day?

A. Left the place 7 o'clock.

Q. In the morning or the evening?

A. In the morning.

Mr. ULRICH.—I do not see what possible object can be gained by taking him into town on Monday,—it is after this thing all happened, through the various wanderings in town that day.

The COURT.—It is not cross-examination.

Mr. PATTERSON.—It is offered for the purpose of testing the credibility of the witness. He has testified two days, then he realizes Lee Choy was in jail and he changes it.

(Argument.)

The COURT.—If he does not remember he can just say that; if he undertakes to answer, give the date, and then changes it, it opens it up. It is proper there should be a limit to it. I was a little bit inclined to feel that the prosecuting attorney had about reached that limit. If he said he could not remember then it would be different.

(Argument.)

The COURT.—What is your purpose, Mr. Patterson?

Mr. PATTERSON.—This man testifies first he came over [314—234] here on the 2d day. Now, may it please the Court, I want to test the credi-

(Testimony of Hoon Wai.)

bility of this witness as to exactly what he did, when he came to town, when he did see Lee Choy and just what happened.

The COURT.—He says Monday the 22d.

(Argument.)

The COURT.—I do not see where it is material, Mr. Patterson. I do not see where the hour was material.

(Argument.) (Question withdrawn.)

Q. Calling your attention to the fact that Monday was the 23d day of October and Sunday was the 22d, now which day was it when you came over here? A. On the 23d day, Monday.

Q. 23d, Monday the 23d. You are sure of that, are you?

A. Yes, I am sure of that. Sunday I could not, I had to kill a pig down there, I could not come in town.

Q. Is that the day you weighed out the chickens?

A. No, I did not weigh out the chickens. I told them to weigh it out for me.

Q. How much did the chickens weigh?

A. Twenty-four pounds.

Q. Now how did you come over to Honolulu that day? A. Came over on a machine.

Mr. ULRICH.—Objected to—

The COURT.—I think it is preliminary.

Q. Who with.

A. I came over on Asoyo's automobile.

Q. Now, did you see Lee Choy when you were

(Testimony of Hoon Wai.)

over here on Monday, the 23d day of October?
[315—235]

A. I came into Chin Tai's store. Lee Choy was not there. I asked the bookkeeper in there to tell me, and he told me 24 pounds my chickens weighed.

Q. Did you see Lee Choy that day?

A. No, I did not.

Q. Between the 18th of October and the 23d day of October did you see Lee Choy or Chin Tai?

A. No.

Q. You didn't see any of them? A. No.

Q. How long after the 18th day of October was it that you heard that Lee Choy had been arrested?

A. A few days after that I heard him.

Q. Who told you?

A. Some of those people over in town here went out to Kaneohe. I overheard the conversation.

The COURT.—You did not hear about it at Chin Tai's store on the day you came in, Monday the 23d? No one spoke of it?

A. No, I did not hear anybody say anything. I just asked him how many pounds my chickens weighed and went off.

The COURT.—So you did not hear of the arrest of the defendant until after you returned to Kaneohe, that is after the 23d? Is that correct. Did you hear that after you returned from here back to Kaneohe?

A. Yes, after I returned there I heard it.

Q. About what day was it that you heard that Lee Choy [316—236] had been arrested?

(Testimony of Hoon Wai.)

A. Well, I heard people down there talking about Lee Choy's arrest a few days afterwards.

Q. About what time, was it after or before the 23d day of October? A. After the 23d of October.

Q. And how long did you stay in Chin Tai's store that day?

A. I came in town, was on my way to some place to buy something, I passed Chin Tai's store and at the same time I asked the bookkeeper in there how much my chickens weighed and he told me 24 pounds, and I walked ahead.

Q. You did not see Chin Tai that day? A. No.

Q. Does Chin Tai ever come over in your place at Kaneohe?

A. He came down my place afterwards once; I was not home.

Q. Afterwards,—after what?

A. After I heard Lee Choy was arrested he came over.

Q. Is that the only time he was ever over to your house?

A. That is the only time after Lee Choy was arrested he was at my place.

Q. He was there one time then?

Mr. ULRICH.—He said the only time after he was arrested.

Q. Isn't it a fact he was—(Question withdrawn). Is it not a fact that he was only over to your place one time?

A. In fact I did not see him afterward. I only

(Testimony of Hoon Wai.)

know that he came over to my place once, when he bought chicken and chicken eggs. [317—237]

Q. That is the only time you know of him coming over? A. Yes.

Q. Was there anyone with Ching Tai and Lee Choy that night?

A. Only them two came in my house except the driver, the driver sitting in the machine outside.

Q. Do you know this driver? A. Yes, I do.

Q. Is he Chinese? A. Yes.

Q. Good friend of yours? A. No.

Q. Has he ever been in your house?

A. Yes, he was at my place before with Lee Choy.

Q. When he and Lee Choy were out there together did he come in the house?

A. No, he did not come in the house, sitting in the machine, sitting on the veranda.

Q. This night he was sitting out in the automobile? A. Yes.

Q. How far is your house from the road?

A. The road right outside my gate.

Q. And where does he live, this driver?

A. I don't know.

Q. Does he live in Honolulu or Kaneohe?

A. I know he don't stay down in Kaneohe.

Q. Now you say this night when Lee Choy was over there he gave you \$50, is that correct?

A. Yes. [318—238]

Q. Fifty dollars, and that was for the things he had purchased that night and things he had purchased before, is that correct? A. Yes.

(Testimony of Hoon Wai.)

Q. How much did you—How much did he owe you after he paid you this fifty dollars?

A. I had that in my book, he owed me over ten dollars, nearer twenty dollars.

Q. He owed you over ten dollars, nearer twenty dollars. Did you mark it down in the book that night? A. Yes, I did.

Q. Put it down in the book, 300 eggs for \$15, you put that down? A. Yes.

Q. Did you put anything down about the chickens? A. Yes.

Q. Did you put down about the chickens?

A. 24 pounds of chickens, \$14.40.

The COURT.—Did you write it down?

A. Yes. I may not put it the same night, the same time I received the money from him.

Q. That was the night that Chin Tai and Lee Choy were over there?

A. The chickens I did not put down that night. I only put down the eggs, not the chickens, because I did not know how much a pound those chickens were.

Q. You did not put down about the *the* pounds of chicken. When did you put the \$14.40 down?
[319—239]

A. That was when I came in town here. I asked the bookkeeper in the store there, and he told me 24 pounds, so I went down there, went home, and put it down in the book.

Q. Now, that night Chin Tai and Lee Choy came into your house didn't they?

(Testimony of Hoon Wai.)

A. Came into my veranda.

Q. You gave them some tea?

A. Yes, I offered them three the drink.

Q. Where did they sit?

A. They sit in a room on the porch.

Q. Is there a light there?

A. Yes, an electric light.

Q. Did they sit in chairs? A. Along a bench.

Q. The two of them came in and sat down on the bench?

A. Yes, they were sitting on the bench, and I have a chair too, besides the bench.

Q. Did you sit on the chair?

A. I sit on the chair, close to the table.

Q. You went out to get the tea by yourself?

A. Yes, I went in to get the tea.

Q. And did you—You brought the tea back by yourself? A. I left it there after awhile.

(Recess until 10:45.)

Q. So Lee Choy and Chin Tai were out on the porch when you left there and when you brought the tea back? A. Yes. [320—240]

Q. And you came out and sat down in the chair and you all three talked?

A. I came out and poured the tea in the cup and offered them the drink. .

Q. Then what did you do?

A. I asked them what they came in for, and they said they wanted to buy chickens and chicken eggs.

Q. Then what happened?

(Testimony of Hoon Wai.)

A. And afterwards Lee Choy and I went up to the house.

Q. Was it Chin Tai that said about buying the chickens and eggs? A. No, Lee Choy.

Q. Did he tell you the price that time?

A. Well, he know the price; I sell him before.

Q. You sold Chin Tai before?

A. Sold to Lee Choy.

Q. Where did he give you the fifty dollars?

A. Just before he left the porch; he pulled the money out of his pocket and gave to me.

The COURT.—In the presence of Chin Tai?

A. Chin Tai was on the porch and when I gave the money to Lee Choy, Lee Choy was on the veranda with me.

Q. Chin Tai was on the porch, you say?

A. There was a room on the porch.

Q. Did he see Lee Choy give you the money?

A. Well, I don't know whether he saw or not, he was sitting in the room on the porch.

Q. Did you and Lee Choy go out together? [321—241]

A. Lee Choy and I was on the veranda counting the eggs.

Q. Was Chin Tai there?

A. He was on the porch smoking.

Q. How far from you was Chin Tai?

A. Well, very close, he was in the room, in the porch there. I was outside. There was a door.

Q. Door open?

(Testimony of Hoon Wai.)

A. Well, swinging doors, close, swinging in and out.

Q. And you talked to Chin Tai?

A. No, I did not, he was in the porch himself.

Q. Could you hear,—the place where Chin Tai was sitting, could he hear you and Lee Choy talking outside?

A. Oh, yes; he was right close to the porch.

Q. Did you or Lee Choy, either one, carry on any conversation with Chin Tai, make any remarks or anything to him during the time you were on the veranda and he was on this porch?

A. No, I only talked to Lee Choy about the chickens and the chicken eggs.

Q. How long—Did you go any place else with Lee Choy?

A. No. I went outside myself to get the chickens.

Q. Did you have them in a sack? A. Yes.

Q. You had them in a sack?

A. Yes, I put the chickens in a bag, cut a little hole through it, the chicken heads stuck out. [322—242]

Q. You caught the chickens after they arrived?

A. Yes, when they asked me for chickens I went and caught the chickens in the chicken-coop.

Q. Then you went into the house and went out to the machine with them when they got ready to go?

A. No, I did not go outside on the machine with them, I was standing on the veranda to bid them

(Testimony of Hoon Wai.)

good-bye. Lee Choy took the chickens out himself.

Q. Who was in the automobile?

A. The automobile,—the driver.

Q. Did the automobile driver come to the house after the chickens? A. No.

Q. You did not give him any tea that night?

A. I offered it to him but he did not come.

Q. Did you have anything to eat that night?

A. No.

Q. Then as Lee Choy was leaving he slipped you this fifty dollars, is that correct?

A. After he counted the eggs he gave me fifty dollars, and he told me we would fix that up later on.

Q. You put it down in the book about the 300 eggs, is that correct?

A. 300 eggs, and six chickens, and I did not put down the pounds.

Q. You did not put down the amount of pounds. Did you put down receiving the fifty dollars?

A. Yes, I did. [323—243]

Q. You didn't make a memorandum about the chickens then, did you?

A. Well, I put down the chickens but I did not put down the pounds.

Q. Did you put down the balance that he owed you?

A. Well, I put down that afterwards, after I came down in town here, and Chin Tai's book-keeper told me so many pounds of chicken, so I went home and entered in the book.

(Testimony of Hoon Wai.)

Q. How long have you lived in the Hawaiian Islands? A. Lived here 32 years.

Q. Have you been back to China?

A. Yes, I went back to China a year before last.

Q. When did you get home?

A. I came back here last year, November. Go to China the year before last.

Q. You got back here just about a year ago?

A. Just about a year.

Q. You mean that it was a year ago that you arrived in the Hawaiian Islands on your way back from China? A. Yes.

Q. And when did you leave for China?

A. I don't remember when I left for China. I don't know how long that was, but I do remember when I came back here last year.

(Witness excused.) [324—244]

Testimony of Mrs. Tom Lee See, for Defendant.

Mrs. TOM LEE SEE was called and sworn as a witness for the defendant, and testified as follows: (Through the official Chinese interpreter.)

Direct Examination.

(By Mr. ULRICH.)

Q. What is your name? A. Mrs. Tom Lee See.

Q. Where do you live?

A. I live on Kukui Street.

Q. Whereabouts on Kukui Street?

A. At Athletic Park.

Q. How long have you lived there?

A. I stayed there since September.

(Testimony of Mrs. Tom Lee See.)

Q. You started to live there beginning with the month of September, the 1st of September?

A. September 1st or 2d, two or three days, took us two or three days to move in there.

Q. What does your husband do, Mrs. Lee See?

A. At the present time he is not doing anything, before that he was running a store.

Q. How long since he has stopped running the store? A. Since September.

Q. The same time you moved into your present home? A. Yes.

Q. What is your husband's name?

A. Tom Leong.

Q. What kind of a store had your husband run?

A. Cigars, soda-water, and post-cards.

Q. Where was it? [325—245]

A. Hotel Street.

Q. Whereabouts on Hotel Street?

A. Hotel near Nuuanu.

Q. Between Fort and Nuuanu or on the other side of Nuuanu?

A. Right next to the drug-store there on the corner.

Q. Is it Waikiki of Nuuanu Street or on the other side of the street?

A. Waikiki side of Nuuanu Street.

Q. How long did your husband run that store?

A. Been running that store 7 or 8 years.

Q. Did you work with your husband in the store there? A. Yes.

Q. And wait on customers who would come in?

(Testimony of Mrs. Tom Lee See.)

A. Yes.

Q. How many children have you, Mrs. Lee See?

A. Eight.

Q. This, I take it, is the youngest. How old is this one? (Referring to child held by mother.)

A. A little over three months old.

Q. Did you ever see or know this Chinese man sitting here on this side of the far table, Mr. Lee Choy?

A. Yes, I knew him when I was running the store; he used to come in the store and buy something.

Q. Did you know him otherwise than as someone who had come in the store to buy things from you?

A. No.

The COURT.—Did you know his name?

Q. Did you, before this case arose, did you know his name? [326—246]

A. No, I didn't know his name.

Q. I will ask you, Mrs. Lee See, was he ever at any time at your house?

A. No, he don't know where I live.

Q. He never visited you at any time at your home? A. No.

Q. Do you know anything about his family or where he lives? A. No, I do not.

Q. Now, on a certain night in last month, the month of October, were you visited by certain officers who made a search of your house?

A. Yes, there was.

(Testimony of Mrs. Tom Lee See.)

Q. Do you remember what night that was, or do you just remember it as an occurrence sometime?

A. I think it was on the 18th, on Wednesday.

Q. Now on that night, at about what time was it, as near as you can remember, that these officers came to your house?

A. I think it was after 11 o'clock, between 11 and 12; I went to bed after 10 o'clock.

Q. Were you in bed when they got there?

A. Yes, I was in bed.

Q. I will ask you to be more specific in that question, whether or not on that night you saw Lee Choy anywhere, or whether or not he was at your house? A. No.

Q. By Lee Choy I mean this Chinese here (indicating the defendant). [327—247] A. No.

Q. When did you first know that his name was Lee Choy?

A. Just lately, I know his name, because I have seen him several times.

Q. Now, when these officers came to your house, describe as nearly as you can tell us just what happened.

A. When the officer arrived my house and knocked at my door I got out and opened the door, and showed the badge, and they came in the house and I asked them what they want and at the same time they want to search my place, and after a while there was a white woman came in.

Q. Do you remember who those officers were, to know them if you saw them?

(Testimony of Mrs. Tom Lee See.)

A. Well, I don't know, I know a big man.

Q. McDuffie, do you know him?

A. I think it was Stevenson, a big man.

Q. Any other man?

A. Several others beside him. I did not count how many of them.

Q. Did you know who any of the others were beside this big man? A. No.

Q. They went through your house and searched it, as I understand it?

A. Yes. They searched my place, and after that the white woman came inside, came in my bed and looked in the bed and some of the officers asked this woman, "Is this [328—248] the one, this the one?" and she says, "No."

Q. Now, when you say, "This the one, is this the one?" to whom do you refer, people in your house?

A. At first the officer asked me if I know this lady, this white lady, and I says, "No" and then he went in my bedroom and asked her "Is this the one, is this the one," referring to my children, "Is this the one?" and she says, "No" and then they went out.

Q. What children did you have in there?

A. My oldest child,—big child in there, some smaller ones; they picked up the two big children.

Q. Boys or girls? A. Boys.

Q. How old is your oldest son?

A. The big one is 20 years old.

Q. And the son 20 years old was in bed?

A. Yes.

(Testimony of Mrs. Tom Lee See.)

Q. He is the one they pointed to and asked, "Is this the one?" A. Yes.

Q. Was there any other son—how old is the other son? A. The other one is 19 years old.

Q. Did they point to him also?

A. Yes, they asked the woman, "Is that the boy?" and she says, "No" and the boy was sleeping.

Q. You say that they asked you if you had ever seen or knew this woman and you said no. Did they say anything to the woman in your presence that you could hear as to [329—249] whether or not she knew him or knew you?

A. The woman heard what the officers asked me, and she was standing right in the front of me.

Q. What I mean is did you hear, or was there anything that you could understand that was said to the woman by way of questioning her as to whether or not she recognized you?

A. Yes, she asked me if I knew this woman, and I told her no.

Q. I want to know if the woman said anything by the way of indicating any recognition of you?

A. No, did not say anything.

Q. Is this the woman you refer to, this second woman sitting here?

A. I don't know. I could not recognize her.

Q. You could not?

A. Well, I am not sure, they came in a little while and they went out.

Q. You say you could not be sure, you could not recognize the woman? (Mrs. Alapa stands up.)

(Testimony of Mrs. Tom Lee See.)

A. No, I could not.

Q. Now, had you ever seen that woman who came into your house that night before in your life, before she came in there with the officers? A. No.

Q. When they came in there and started to search your house did they say anything about what they were looking for or anything of that sort? [330—250]

A. No, I don't know. I asked them what they were searching for and they did not tell me.

Q. Did anybody say anything about who they were looking for when they would say, "Is this the one; is this the one"? A. No.

Q. What had you been doing at your house there during the earlier part of the evening?

A. Well, took the children and bathed the children and put them to bed.

Q. You had been right there in your home all evening, had you? A. Yes.

Q. Nothing had happened earlier in the evening of any kind? A. No.

Q. After they had brought the woman in there and taken her around the house and asked her whether this one was the one, or this was the one, what happened, did they simply leave or did they do anything else, having searched the house and taken the woman around the house?

A. They left the house and then I put the children to bed and I go to bed.

Q. During your whole time of this visit there was there anything said to you or had you any idea

(Testimony of Mrs. Tom Lee See.)

of what they were doing, what they were looking for, or what the object of their visit was?

A. No, I have no idea whatsoever. [331—251]

Q. When you say that they said, "Is this the one?" and various other phrases, was this in English? Do you understand English?

A. Yes, I understand.

Q. Do you understand what I am saying now or just a few words? A. Oh, just a few words.

Q. How long do you think they were at your house altogether? A. Over 10 minutes.

Q. Was your husband at home that night?

A. Yes, he was sleeping.

Q. Didn't they point him out? A. No.

Q. He was not sleeping in the room with the child?

A. He was sleeping in the next room.

Q. Had he been there all evening? A. Yes.

Q. And they went away, that is all that you know about that? A. That is all.

Cross-examination.

(By Mr. PATTERSON.)

Q. Your husband used to be in the store business?

A. Yes.

Q. On Hotel Street? A. Yes.

Q. How big a store did he have there?

A. Small little store, one story and we got half.

Q. How big a space did that store occupy? [332—252]

A. She says about 10 feet wide.

The COURT.—As long across as this room?

(Testimony of Mrs. Tom Lee See.)

Q. How long?

A. I think,—I don't know whether it is 20 feet or not deep.

Q. Saying this is 10 feet wide, taking this wall over here as a base, how far would it run this way?

A. From this corner here over to that picture there, about that deep. (Indicating.)

Q. About how wide, bring it over from the wall to yourself and past yourself?

A. From the corner there to that picture, about that wide.

Q. What did he sell in the store?

A. Tobacco, soda-water, post-cards.

Q. And that is on Hotel Street, between Nuuanu and what?

A. It is right next to the drug-store on the corner of Nuuanu and Hotel Street, right next on Hotel Street.

Q. What drug-store?

The INTERPRETER.—There is a drug-store on the corner of Nuuanu and Hotel Street, right next.

Q. He went out of business last September?

A. Yes, last September.

Q. Closed up the store or sold it?

A. Closed up the store.

Q. Business poor? A. Business poor.

Q. Since September your husband has not worked, is that correct? [333—253] A. No.

Q. How old a man is your husband?

A. Sixty years old.

(Testimony of Mrs. Tom Lee See.)

Q. Is he strong or is he sickly?

A. Well, he is not sickly, but he is pretty old.

Q. He is your present husband, isn't he?

A. Yes.

Q. And the father of that child you hold in your hands? A. Yes.

Q. How old is that child?

A. Over three months.

Q. When was the store closed up?

The COURT.—Last September.

Q. When was the store closed up?

A. Closed in September.

Q. Of this year? A. Yes.

Q. Who opened the door this night when the officers came? A. I came and opened the door.

Q. Were you dressed? A. Yes.

Q. Like you are to-day?

A. Not these, other clothes.

Q. Had on your house clothes? A. Yes.

Q. Did you come to the door immediately?

A. When they knocked at the door I woke up, and stood [334—254] a while and listened. I opened the door and as soon as I opened the door the officer showed me his badge and then came in.

Q. The light was on in the house, was it not?

A. Yes, I have to put the light on in order to put those children to sleep.

Q. You had to put the light *out* in order to put the children to sleep? A. Yes.

Q. Did you leave the light on all night in your house? A. Yes, one light burned all night.

(Testimony of Mrs. Tom Lee See.)

Q. In which room was the light in which the light was on all night?

A. The light in the parlor was shining in the bedroom.

Q. You left the light on that night to put the children to sleep, is that correct?

A. Every night.

Q. Did the children sleep in the front room?

A. The big boy sleeping in the front room.

Q. In the parlor?

A. There is no room in the parlor.

Q. In this, this room with the parlor, there is no one sleeps in there?

A. No, nobody sleeps in that parlor.

Q. Where were you that night when you heard the knock on the door?

A. I was in my bedroom giving milk to this child here.

Q. Nursing the child? A. Yes. [335—255]

Q. At the time the knock came you were nursing the child, is that correct? A. Yes.

Q. The child was at your breast? A. Yes.

Q. You remember that distinctly? A. Yes.

Q. And when they came in to the room, these officers, they begin to look around?

A. Looked around and flashed a light under the bed, under the table.

Q. You remember distinctly that this woman said that—pointed to your boys and said that is not the boy, is that correct? A. Yes.

(Testimony of Mrs. Tom Lee See.)

Q. Wasn't there an old man in the house that was dressed up that night?

A. That was my husband, he was sleeping in the room when the officers came and woke him up.

Q. That was your uncle?

A. That was my husband.

Q. And did he have all his clothes on?

A. Well, he had his underwear on.

Q. He did not have his outer clothes on?

A. No.

Q. What did you say you did when you heard this knock at the door?

A. As soon as they knocked at my door I woke up.

Q. They woke you up? [336—256]

A. Well, I was nursing my child, I was half asleep.

Q. You were just half asleep then?

A. Half asleep and half awake.

Q. They did not wake you clear up, they just woke you half up, is that it?

A. Well, half awake, half asleep.

Q. What time did you go to bed that night?

A. After 10 o'clock.

Q. Do you sleep with your clothes on? A. Yes.

Q. Don't you have night clothes to sleep in?

A. No, Chinese clothes.

Q. And the clothes you sit around the house in you sleep in at night? A. Yes.

Q. You mean to tell us that you have no particular dress which you wear when you retire at

(Testimony of Mrs. Tom Lee See.)

night different from the dress you wear in the day-time?

A. Well, same kind of clothes when we sleep, changed to another dress the same as day clothes.

Q. Do you sleep with your shoes on? A. No.

Q. These officers found some opium containers in your house that night, didn't they?

A. That is two horns, when we moved that was left in the old clothes by one of my cousins.

Q. Where did they find these two horns?

A. They found *that* horns in the kitchen, in the clothes [337—257] basket.

Q. And they were left there by your cousin?

A. Yes.

Q. Where is your cousin now?

A. I don't know where he is at now, sometimes he goes to work down in the country, sometimes he works in town here.

Q. When did your cousin leave these opium horns in this house?

A. I don't know when did he leave there. When we moved we wrapped all the things in the old clothes and moved up there.

Q. Did you tell the officers your cousin had gone to China?

A. No, I did not. I told him I didn't know where he is at.

Q. Was Lee Choy out to your house that night?

A. No.

Q. Did you see him that night?

A. No, I did not see him.

(Testimony of Mrs. Tom Lee See.)

Redirect Examination.

(By Mr. ULRICH.)

Q. You say the officers found two opium horns in your house. What do you mean by opium horns? I will ask you to describe it.

A. That is two horns. You know opium horn near bone, something like bone, and near glass.

Q. That is something used to ship opium in or smoke it or use it with? [338—258]

A. Well, I don't know how they get this thing, these horns.

Q. Are those tins of opium—the tins aren't here.

Mr. PATTERSON.—I will admit it is not a tin of opium.

The COURT.—She does not say that it is an opium tin but an opium horn.

Q. You say you left a light in there so that your child could sleep. Did you have to get up from time to time during the night to take care of your child?

A. Yes, I would get up to nurse the baby, change the diaper.

Q. When you say you closed up your store what did you mean by that, was the building closed up or had some other person moved in to take over the business?

A. Well, the business was sold and at the same time the other people got the lease of that place.

Q. And your husband is now retired and is doing nothing? A. No.

Q. That is all.

(Testimony of Mrs. Tom Lee See.)

Recross-examination.

(By Mr. PATTERSON.)

Q. Is your husband a rich man or a poor man?

A. Poor man.

Q. He has no source of income?

A. Nothing. He has nothing at all, only raise up the children.

Reredirect Examination.

(By Mr. ULRICH.) [339—259]

Q. You have two grown sons that are helping support you and the family, haven't you? A. Yes.

Q. These opium horns were nothing like this, were they. (Indicating tins of opium.)

A. These opium horns are made out of horn.

The COURT.—Cow's horn?

A. I think it is from the cow's horn.

Mr. PATTERSON.—(Indicating opium tins.) Do you know what this is in here?

A. I don't, never saw anything like that before.

(Witness excused.)

Testimony of Won Tim, for Defendant.

WON TIM, called and sworn as a witness for the defendant, testified as follows:

Direct Examination.

(By Mr. ULRICH.)

Q. What is your name? A. Won Tim.

Q. How old are you? A. Twenty-six.

Q. You were born in Hawaii and lived here all your life? A. Yes.

(Testimony of Won Tim.)

Q. You were educated in the public schools in Hawaii, were you? A. Educated?

Q. In the public schools in Hawaii? [340—260]

A. Yes, I was, here in the Pearl City School.

Q. Did you go from the grammar school into high school, or was your education purely in the grammar school?

A. Just in the grammar school, and I went back to China.

Q. You went back to China? A. Yes.

Q. When did you go back to China? A. 1909.

Q. And did you stay there?

A. About a year and one-half.

Q. Studying Chinese and other things there?

A. Chinese and other things, yes.

Q. What have you been doing in the past year or so as a business? What is your business? What do you do? A. Here now?

Q. Yes. A. Chauffeur.

Q. What kind of a car do you drive?

A. Hudson.

Q. How long have you been driving that car?

A. About two years.

Q. Where is your stand, where do you keep your car? A. On Smith and Hotel Street.

Q. Have you been at that same stand all this time, two years? A. Yes.

Q. Before that two years what did you do? [341—261]

A. Well, I was a bartender for a while, on the water.

(Testimony of Won Tim.)

Q. Do you know Lee Choy, the gentleman here?

A. Yes.

Q. Have you known him for some time—how long have you known him?

A. He was driving with me, the same stand.

Q. When he was driving as a chauffeur you knew him? A. Yes.

Q. He had a car at your stand? A. Yes.

Q. Do you know a Chinese person here in town named Chin Tai? A. Yes, I know him.

Q. Do you know where his store is? A. Yes.

Q. Where is Chin Tai's store?

A. On Maunakea Street, near Hotel Street.

Q. Maunakea near Hotel? A. Yes.

Q. Do you remember hearing of the arrest of Lee Choy sometime last month? A. Yes.

Q. You have in mind hearing about that or reading it in the paper? A. I saw it in the paper.

Q. Now, do you remember the day when he was arrested, according to the reports that came to you, can you remember that night? [342—262]

A. It was one night I took him over to Kaneohe.

Q. Do you remember that night?

A. It was the 18th, I guess, last month.

Q. Do you remember hearing about his arrest the next day? A. Yes, the next day.

Q. The next morning you heard about it. I merely want to call your attention to that particular date, the 18th, the morning after the day you heard of his arrest. On that night of the 18th did you see Lee Choy? Did you see him that night, the 18th?

(Testimony of Won Tim.)

A. I drove him down in the country that night.

Q. Now where did you pick him up and take him on to your automobile?

A. They rang me up around Chin Tai's store. I got to my stand. They told me to go down to the store.

Q. And you did go down to the store? A. Yes.

Q. At about what time did you go to Chin Tai's store that night?

A. I guess about a little after ten past nine.

Q. Who did you take into your automobile at Chin Tai's store a little after 9 that night?

A. Took Lee Choy and Chin Tai.

Q. And where did they sit in your automobile?

A. Sit in the back seat.

Q. Anyone else sit in the car at all?

A. Nobody else, only them two. [343—263]

Q. Then where did you go with Chin Tai and Lee Choy sitting in the automobile?

A. Right straight down to Kaneohe.

Q. From the store, over the Pali?

A. Over the Pali, yes.

Q. Did you stop anywhere or not between Honolulu and Kaneohe? A. No, went right down.

Q. Did you proceed at a fast speed or just an ordinary speed. A. Ordinary speed, not fast.

Q. About how long did it take you to make the trip?

A. I guess about three-quarters of an hour.

(Testimony of Won Tim.)

Q. Three-quarters of an hour. Have you a clock or watch in your automobile?

A. Yes, a special clock on the dash board.

Q. Did you notice about what time it was when you got over to Kaneohe?

A. I think it was about 10 o'clock, I guess.

Q. Do you say that because you remember looking at the time or because you think it is about 10 o'clock?

A. I think by the time I left the store, took me three-quarters of an hour to get down there.

Q. Did you notice the time when you left the store?

A. Yes, when I left the stand I noticed the time.

Q. When you got to Kaneohe where did you go in Kaneohe? A. Called down to Awai's house.
[344—264]

Q. Where is that house?

A. Past Kaneohe court, I guess half a block. I turned in to Awai's house.

Q. You say Awai, is that the man known as Hoon Wai? A. I knew him as Hoon Awai.

Q. Have you seen him here this morning, waiting out in the hall? A. Yes.

Q. You saw him come in here and testify did you not? A. Yes.

Q. Now, when you got to his place, this Awai or whatever his name is, did you stop there?

A. Yes, stopped there.

(Testimony of Won Tim.)

Q. Did you get out of the automobile or did you sit in it? A. I stayed in the automobile.

Q. Stayed in your automobile. And what did Chin Tai and Lee Choy do?

A. They were in the house.

Q. How long do you think it was that you sat out in the automobile waiting for Lee Choy and Chin Tai before you started back to town again?

A. I guess between half an hour and three-quarters of an hour.

Q. Between half and three-quarters of an hour, Do you remember how far you were from the house, where Chin Tai and Lee Choy had gone? [345—265]

A. His house is near the street, just a little—wide as this hall from that end to there. (Indicating.)

Q. You stayed about as far as one side of the room to the other from the house where they went?

A. Yes.

Q. Did they or any of them bring anything out and put it in the automobile?

A. They got a crate, a big box they packed with eggs in it, and a pack of chickens.

Q. Where did they put the box with the eggs?

A. The eggs were put in a box or crate.

Q. Where did they put the chickens?

A. Tied them on the running-board.

Q. Did you stay out there in the automobile all the time while they were there? A. Yes.

Q. And after you had stayed there for about three-quarters of an hour did they come out and get in your car again?

(Testimony of Won Tim.)

A. Yes, came out and walked right home.

Q. Did the man who owned the place there, Awai, or whatever his name is, come out to your car at all?

A. No, I did not see him in that car.

Q. You don't think he came out? A. No.

Q. Did anything particular happen while you were staying out there that you can recall?

A. No, sir. [346—266]

Q. Did you notice what time it was when you started back to Honolulu?

A. I got in town about half-past 11, but I do not know what time I left there.

Q. Did you notice the time you left there—You say when you got back to town you noted the time, is that right?

A. When I got home it was about 35 minutes past 11.

Q. But you don't know what time exactly you left Kaneohe?

A. Quarter to 11, 10 minutes to 11, something like that.

Q. You merely judge that from the time you got back and the time you think you took for the trip?

A. Yes.

Q. You drove on back to town the same way you came, did you, from there over the Pali?

A. The same way.

Q. Chin Tai and Lee Choy were sitting in the back seat? A. Yes.

Q. Did you stop anywhere on your way back to town before you went back to Chin Tai's store?

(Testimony of Won Tim.)

A. Came right back to Chin Tai's store.

Q. When you got to Chin Tai's store you stopped there, did you? A. Yes.

Q. Did they get out there?

A. Yes, they took their eggs and chickens out and I went home. [347—267]

Q. Who paid you for the trip?

A. Lee Choy paid me.

Q. Paid you then? A. Yes.

Q. How much did he pay you?

A. About six dollars.

Q. And then you went on back to your auto stand? A. I went back, right home.

Q. You went home? A. Yes.

Q. You noticed the time when you got back?

A. Yes.

Q. And it was what time?

A. 35 minutes past, about half-past 11, or 35 minutes past 11 when I got home.

Q. And the next morning you heard that Lee Choy had been arrested?

A. In the morning I did not know it, in the afternoon I saw it in the last edition of the paper

Q. You saw it in the paper the next day?

A. Yes.

Cross-examination.

(By Mr. PATTERSON.)

Q. How long were you over in China?

A. About two years.

Q. Have you ever been arrested? A. No.

(Testimony of Won Tim.)

Q. And do you know,—how long have you known Lee Choy? [348—268]

A. I was driving on the stand with Lee Choy.

Q. How long ago?

A. He quit driving over a year, I think I knew him over three years.

Q. Drove on the same stand together?

A. He went off the stand once.

Q. You got to know him pretty well then didn't you? A. Yes, pretty well.

Q. You and he were good friends?

A. Not very good friends, he knew me and I knew him, we drove from the same stand.

Q. What time did they ring you up that night?

A. About nine or after nine.

Q. It was after 9 they rang you up? A. Yes.

Q. They rang you up at your stand?

A. Yes, Smith and Hotel Street.

Q. You went up to Chin Tai's place? A. Yes.

Q. Can you fix the hour when they rang you up?

A. I am not sure. I got down to Chin Tai's from about 10 after 9, to 10 after 9 to a quarter after 9.

Q. What kind of automobile have you got?

A. A Hudson.

Q. How far is it from here to Kaneohe?

A. I think it is about 12 or 13 miles, I guess.

Q. You think 12 or 13 miles. This night how long were you gone altogether? [349—269]

A. I think about two hours and a half.

Q. You think about two hours and a half. You had to figure that up?

(Testimony of Wen Tim.)

A. I left a quarter after 11, a quarter after 9,—and got back about half-past 11.

Q. So you just figured it up now. You did figure it up just now on the stand, how long you had been gone?

A. No. It is a quarter past 9, well I say from 9 o'clock to half-past 11, two hours and one-half.

Q. Just now on the stand, when I asked you the question, you immediately figured how long you were gone, didn't you, you figured up the time just now. Did you think about this yesterday, how long you were gone? A. I do not understand.

Q. You were gone about two hours and one-half you say? When did it first occur to you that you were gone two hours and one-half, just now or yesterday, on the 18th or when?

A. On the 18th night.

Q. That is when you figured up you were gone about two hours and one-half? A. Yes.

Q. Is that what you base your charge on? You charged him six dollars for the trip, didn't you. Is that what you fix your charge on, being gone two hours and one-half?

A. It is—I did not charge them by hours, just charged them by the trip.

Q. You say you first thought about being gone two and one-half [350—270] hours on the 18th, didn't you? A. Yes.

Q. And figured out how long you had been gone that time? A. Yes.

Q. When you go on a trip from your automobile

(Testimony of Won Tim.)

stand, and stand in front of a man's house for an hour, don't you charge him for that?

A. If it is a friend like that we do not charge him.

The COURT.—Did you fix this charge of six dollars before you started, or after you returned. When did you tell him you would charge him six dollars?

A. Yes, he started to pay me six dollars to go over there.

Q. Who paid you six dollars?

A. Lee Choy; came back and he paid me.

Q. When did you arrange that you would charge him six dollars?

A. We always take him down there for six dollars.

Q. Anybody? A. No, not anybody.

Q. How many times did you take Lee Choy down there?

A. About three times; I don't know; I don't remember.

Q. Did you take him down since this trip?

A. No.

Q. You have not been over there since then?

A. No.

Q. Were you over there with Chin Tai since then?

A. Since that night? Only one time, that night.
[351—271]

Q. Did you ever come over there the night before this time? A. Yes, went down there one time.

(Testimony of Won Tim.)

Q. In the night-time? A. Yes.

Q. What time did you leave here?

A. Between 7 and 8; I can't remember; long ago.

Q. How long ago was that? A. Last month.

Q. October? A. Yes.

Q. And then it was the same month this crime happened; the same month that you went over with Lee Choy and Ching Tai, wasn't it? A. Yes.

Q. You made two trips that month. What did Lee Choy do there? A. Took a package over there.

Q. During that time?

A. I know last month he took a box of apples down there.

Q. He took a box of apples over to him?

A. Yes.

Q. You are sure they were apples? A. Yes.

Q. What time did you leave here, about 7 or 8 o'clock that night? A. I guess so, yes.

Q. What time did you get to Kaneohe that night?
[352—272]

A. I don't know; I don't remember what time.

Q. About what time?

A. It took me about three-quarters of an hour to get there.

Q. How long did you stay over there that time?

A. That time went into the house, took a ride over to Heeia.

Q. Did you go over to Heeia to call on another Chinaman? A. Just took a ride there.

Q. You called on another Chinaman in Heeia?

A. No.

(Testimony of Won Tim.)

Q. How far is Heeia from Kaneohe?

A. About a mile, I guess.

Q. Was there anyone else in the automobile with you and Lee Choy on that trip?

Mr. ULRICH.—I want to interpose some objections. Counsel simply takes the witness over times, over occurrences and over other happenings that have nothing to do with the case,—to take him over other trips he has made before this time. I submit it is unreasonable cross-examination.

(Objection overruled.)

Mr. ULRICH.—Exception.

Q. Who went with you besides Lee Choy to Heeia on that trip? A. Four or five boys.

Q. Chinese boys? A. Chinese boys. [353—273]

Q. Did you go in Awai's house that night?

A. No, I did not go in.

Q. You have never been in his house? A. No.

Q. Never been inside?

A. That night I did not go in, though.

Q. Were you ever inside Awai's, were you?

A. Yes, before.

Q. You know Awai pretty well, don't you?

A. No, not pretty well. I could recognize him if I saw him on the street.

Q. Did you see Awai on the night of the 18th?

A. He did not come outside. I saw him on the veranda. I was out sitting in the machine.

Q. What was he doing?

A. He was talking to Lee Choy, and Chin Tai.

(Testimony of Won Tim.)

Q. He did not talk to you that night?

A. Talk with me? No.

Q. Never said a word? A. No.

Q. You remember that, don't you? A. Yes.

Q. You didn't go in the house and drink tea with him? A. No.

Q. He never said a word to you that night?

A. No.

Q. If he had said anything to you you would have remembered it now, wouldn't you? [354—274]

A. I guess he—I do not know. I think he did not talk to me at all.

Q. He did not say a word, did he? A. No.

Q. Didn't he come out and help tie the chickens on the automobile? A. No, Lee Choy took it out.

Q. He did not tie them on the automobile?

A. Tied it on to my extra tire, fastened it on.

Q. Did he use a rope? A. Kind of heavy string.

Q. Where did he get the string?

A. In my side pocket.

Q. How far was your automobile from the house?

A. About from here to this wall.

Q. From that wall to this wall, is that correct?

A. Yes, about that wide.

Q. About 40 feet, would you say that was, or how many feet?

A. I don't know how wide is this wall.

Q. Awai didn't come off the porch that night at all, did he? A. I don't quite remember.

Q. You do not quite remember? A. No.

Q. You say they had the eggs in a box?

(Testimony of Won Tim.)

A. Yes, sir.

Q. Did they take them out when they first came there, or wait until they left? [355—275]

A. Until they left.

Q. And you saw the three of them on the porch?

A. Yes.

Q. You saw them there all the time? A. Yes.

Q. What were they doing?

A. They were talking. I didn't pay any attention to them at all, except they were talking.

Q. You heard them talking from where you were?

A. I heard them talking, but I do not know what they were saying.

Q. The three of them were on the porch together?

A. Yes.

Q. Did you see them all the time?

A. Sometimes they go in the office.

Q. Did you sit in the automobile all the time?

A. Yes.

Q. Didn't get out at all?

A. No. One time the chicken,—when Lee Choy brought the chickens, I went out and tied the chickens up.

Q. Awai stood on the porch all the time?

A. Yes.

Q. Did he help pack the box out, the egg box?

A. No.

Q. Who took that out? A. Lee Choy.

Q. Who packed out the chickens?

A. He packed it out too. [356—276]

Q. Went back and got the chickens? A. Yes.

(Testimony of Won Tim.)

Q. Was the box all fixed when you got there?

A. I don't know whether it was all fixed or not.

Q. Did you see them packing the eggs?

A. No.

Q. You didn't hear them talk anything about that? A. No.

Q. Never heard what they were talking about?

A. No.

Q. Did you see them drinking tea?

A. I don't quite remember that.

Q. You don't remember anything about tea that night at all? A. No.

Q. You were in China a year and a half?

A. Two years.

Q. Went to school over there?

A. I went to school a year and a half and I quit.

Q. And what time did you leave Awai's place that night on the way back to Honolulu?

A. I guess about a quarter to 11, I guess. I got home about half-past 11, and took me about three-quarters of an hour to get back.

Q. You say before you started you had a talk about how much you were going to charge Lee Choy for going over there? A. Yes. [357—277]

Q. In front of Chin Tai's store?

A. We did not—he did not tell the price there.

Q. He did not say the price, how much you were going to charge him to take him over to Kaneohe and back?

A. Every time I take him over there he give me six dollars.

(Testimony of Won Tim.)

Q. You used to be a bartender? A. Yes, sir.

Q. And a waiter? A. Yes.

Q. That is before you were a chauffeur?

A. Yes.

(Witness excused.)

Testimony of You Lum, for Defendant.

YOU LUM was duly called and sworn as a witness for the defendant, and testified as follows: (Through the Official Chinese Interpreter.)

Direct Examination.

(By Mr. ULRICH.)

Q. Your name? A. You Lum.

Q. What is your occupation? What do you do?

A. Salesman.

Q. Salesman? Who do you work for? Where do you work? A. Chin Tai.

Q. You are a clerk or worker in Chin Tai's store, are you not? A. Yes. [358—278]

Q. Do you remember a certain night last month, October, when—I will withdraw that question. First, do you know Lee Choy, the defendant here?

A. Yes, I do.

Q. Now then do you remember a certain night in October when Lee Choy came to Chin Tai's store and left with Chin Tai on a trip to the country?

A. Yes.

Q. Can you say from anything that you have in mind what date that was in October, or what night?

A. October the 18th.

(Testimony of You Lum.)

Q. And how do you remember it as October the 18th? A. I remember I entered it in a book.

Q. What did you enter in a book?

A. When I bought the tomato and some other stuff I entered it in a book.

Q. You remember it as the same day you bought some things and you entered it in the book?

A. Yes.

Q. Do you remember hearing of Lee Choy's having been arrested?

A. Yes, I do, when Chin Tai told me that Lee Choy was arrested.

Q. When did you hear from Chin Tai that Lee Choy was arrested with respect to this evening that you saw Lee Choy and Chin Tai in this store?

Mr. PATTERSON.—Objected to as leading.

The COURT.—Objection overruled. [359—279]

A. The following morning.

Q. The following morning you heard that he had been arrested. Now what time was it, as near as you can remember, when Lee Choy came to the store there that night?

A. I think it was about 9 o'clock that evening. I was in the front part of the store.

Q. Was anyone in the store there when Lee Choy came in about 9 o'clock excepting yourself, and Chin Tai and Lee Choy?

A. Nobody else but Chin Tai.

(Adjournment taken until 9 o'clock, A. M. Wednesday, November 15, 1922.) [360—280]

(Testimony of You Lum.)

In the United States District Court in and for the
Territory of Hawaii.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

On Wednesday, November 15th, 1922, at 9 o'clock A. M., all parties being present as before, the following further proceedings were had and testimony taken:

(Jury all present.)

YOU LUM resumed the stand for further examination, and testified as follows: (Through the Official Chinese Interpreter.)

Direct Examination (Continued).

(By Mr. ULRICH.)

Q. At the close of last session you were telling us about the occasion on the night of October 18th when Lee Choy and Chin Tai were together in Chin Tai's store at about 9 o'clock. How long was it after Lee Choy came to the store there that he and Chin Tai left, as near as you can remember?

A. Ten minutes.

Q. Were they there about ten minutes?

A. Over ten minutes.

Q. From where you were while they were there together [361—281] could you overhear or did

(Testimony of You Lum.)

you overhear any part of the conversation between them? A. No.

Q. What time did you usually close the store there at night?

A. Sometimes half-past 9, sometimes half-past or near ten.

Q. Now on this night when Chin Tai left with Lee Choy did he close up the store, or what did he do?

A. They did not close the store, told me they were going down the country, told me to wait a little while and close up.

Q. Was anyone else left in the store there excepting you? A. Left only myself.

Q. Did you see how they left the store, that is whether they went away in a car or walked?

A. They got on the machine and drove away.

Q. And they went away and you stayed there in charge of the store, did you? A. Yes.

Q. About when did you close the store up?

A. After 9 o'clock, near 10.

Q. And you did not see any more of Lee Choy or Chin Tai that night? A. No.

Q. Do you know a man named Hoon Wai who lives down in Kaneohe? [362—282]

A. Yes, I know him. I know his name, but I don't know where he lived.

Q. Now did you see this man Hoon Wai within a few days after this time, that you have testified to?

A. I saw him four or five days after.

(Testimony of You Lum.)

Q. Well, can you tell us what the date was you saw him?

A. I don't remember; I think it was on Monday, four or five days after.

Q. Do you remember what day of the week this was Lee Choy and Chin Tai were at the store?

A. Wednesday.

Q. And if it was Monday that you saw him, was it the following Monday?

A. Yes, the following Monday, either Monday or Tuesday.

Q. Do you have anything to do, in the course of your duties in Chin Tai's store there, in taking care of the books?

A. I have nothing to do with the books there, there is another bookkeeper in there taking charge of the books.

Q. Now when was it, under what circumstances was it, that you saw him Monday,—under what circumstances was it that you saw him on Monday, as you have testified,—where?

A. I saw him pass my store.

Q. Did he come into your store there?

A. No, he did not.

Q. You are not the bookkeeper?

A. No. [363—283]

The COURT.—You say you saw him pass your store. You mean by that he did not stop, he kept on moving?

A. Passed right along the store.

Q. What is the bookkeeper's name there?

(Testimony of You Lum.)

A. There is two in there, one Chin Tai himself, another one by the name of,—a Chinese boy and himself taking charge of the books.

Cross-examination.

(By Mr. PATTERSON.)

Q. What time did you close up on the night of the 18th? A. After 9 o'clock, after 9, near 10.

Q. You never make any entries in the books at all? A. No.

Q. You got nothing to do with the books at all?
A. No.

Q. Do you sell anything on credit there?
A. Yes.

Q. And when you do that do you make an entry in the books?

A. No, tell Chin Tai and Chin Tai put it in himself.

Q. You never write it in yourself? A. No.

Q. Never since you have been in the store have you done that? A. No.

Q. Who put the money away that night?
A. Chin Tai.

Q. Before he went over to Kaneohe?
A. Yes. [364—284]

Q. You saw him count it up? A. Yes.

Q. Where did he put it? A. In the safe.

Q. What time does he usually count the money up at night? A. After 8 o'clock.

Q. You are positive that on this night, before he went to Kaneohe, that he counted up the money, is that correct? A. Yes.

(Testimony of You Lum.)

Q. Was Lee Choy there when he was counting up the money? A. No, he wasn't there.

Q. And you are just as sure that he counted up this money as you are that Lee Choy came there that night, aren't you?

A. After Chin Tai put the money away then Lee Choy came.

Q. Did you see him count the money on the counter as he usually does? A. Yes.

Q. See him make an entry in the books?

A. Yes.

Q. What did he do with the money?

A. After he counted the money, entered in the books, and then took it and put it in the safe.

Q. Did he lock the safe? A. Yes.

Q. Do you know how to get into the safe?

A. No. [365—285]

Q. Chin Tai is the only man around there who knows how to get in and out of the safe? A. Yes.

Q. How big is this safe?

A. As big as that railing there. (Indicating.)

Q. How deep is it, deep as your hands are to fold, or just about how deep?

A. About that wide, about that deep. (Indicating.)

Q. About square? A. Yes.

Q. And where do you live?

A. On Pauahi Street,—the other street I don't know the name of.

Q. How far from the store?

(Testimony of You Lum.)

A. Two or three blocks away from the store,—
three or four blocks away from the store.

Q. Is there another bookkeeper in there besides
Chin Tai? A. No, nobody else.

Q. Who opened up the store the next morning.

A. I did.

Q. Did you find the eggs when you got there
the next morning? A. I did.

Q. Is there a stove in the store?

A. Yes, a stove.

Q. Did you find the chickens too? A. Yes.
[366—286]

Q. Did you count the eggs that morning?

A. Yes, I did.

Q. How many were there? A. Three hundred.

Q. You are sure of that? A. Yes.

Q. Did you sell these eggs in the store or do
you eat them yourselves down there? A. They sell.

Q. Was you out of eggs the night before?

A. All sold, eggs all sold.

Q. The eggs were all sold the night before?

A. Yes.

Q. The box had not been opened when you got
there in the morning? A. No.

Q. Where were the chickens?

A. One box of chickens.

Q. The chickens were in a box? A. Yes.

Q. You remember the box?

A. Yes, I remember.

Q. Describe the box to the gentlemen of the jury?

A. A box about that big, I seen.

(Testimony of You Lum.)

The COURT.—A box you keep in the store, a box to put the chickens in. You understand the chickens came and were stored in that box?

A. It is our box. [367—287]

The COURT.—Is that the box you kept there for putting chickens in?

A. Yes, they brought the box with the chickens the same time.

Q. In other words, that is a box that was not in the store the night before? A. No.

Q. Were those chickens dead chickens or live chickens? A. Live chickens.

Q. What did you do with these chickens afterwards? A. I took the chickens off and weighed.

Q. Did you weigh them yourself? A. Yes.

Q. How much did they weigh?

A. Twenty-four pounds.

Q. Have you got a chicken run there in the back of the store? A. No.

Q. Have you got boxes that you ordinarily kept chickens in?

A. Whenever we bought any chickens why we put up a box and kept them there.

Q. Have you got a regular box for that purpose?

A. Yes, we have one.

Q. That was not in use this night, was it?

A. Yes, we used that box.

Q. You had other chickens in the store then?

A. No. [368—288]

Q. But this regular box you ordinarily used was not in use that night, there were no chickens in it?

(Testimony of You Lum.)

A. No, did not use that night.

Q. And these chickens were very comfortable in this box that came from Kaneohe? A. Yes.

Q. What did you do with this box that the chickens came from Kaneohe in?

A. Well, I took the chickens out inside the box, put them outside the store for sale.

Q. Did you sell all the chickens at one time?

A. Sold three.

Q. Now, after you had sold the chickens what did you do with that box?

A. Throw them away, burn them up.

Q. You still got your regular box down there?

A. Yes, I still have that other one.

Q. Do you know Lee Choy? A. Yes, I know him.

Q. How long have you known him?

A. I have known him for a long time.

Q. Do you know this Chinaman from Kaneohe?

A. I do not know him.

Q. Did you ever see him before he came up to court? A. No.

Q. You have never seen this man from Kaneohe until you came up to court?

A. I saw him over when he passed the store.

[369—289]

Q. When he passed the store where?

A. Passed the store by our street.

Q. How did he pass, in an automobile or how?

A. Walked.

Q. Did he come inside the store? A. No.

Q. He has never been inside your store?

(Testimony of You Lum.)

A. Only when he buy something he come in the store.

Q. Now, what night did you say this was Lee Choy came to get Chin Tai to go to Kaneohe?

A. On the 18th.

Q. Who telephoned—How did he come up there, come in an automobile or afoot or how?

A. He came on an automobile.

Q. The automobile waited out in front for him and Chin Tai?

A. Yes, waited in front of the store.

Q. Now there was a Chinese boy by the name of Won Tim that drove them over, do you know him? A. No, I do not know.

Q. Did you see him waiting out there that night?

A. No, I did not see him.

Q. But you are sure there was an automobile out there? A. Yes.

Q. Did you see the automobile?

A. Well, there was an automobile. In fact there is an automobile there every time. [370—290]

Q. Did you see Lee Choy get out of the automobile before he came into the store?

A. Well, I saw Lee Choy come in the store.

Q. Did you see him get out of an automobile?

A. I saw Lee Choy come in.

Q. What did Lee Choy say to you?

A. I did not hear him say anything; he did not say anything to me.

Q. Did he say anything to Chin Tai?

(Testimony of You Lum.)

A. Yes. He was talking to Chin Tai, but I don't know what they were talking about.

Q. Were you there in the store? A. Yes, I was.

Q. What were they talking, speaking what language? A. Speaking Chinese.

Q. Did you hear them say anything about a trip to Kaneohe?

A. Chin Tai told me, "Wait a little while, close up the store," he was going down the country.

Q. Was Lee Choy there when Chin Tai told you that? A. Yes, he was there.

Q. Did they say anything about how they were going to go?

A. Well, I did not hear what they say, I know they have to go on a machine.

Q. Where were they, in the front part of the store or where? A. Front part of the store.
[371—291]

Q. How long did they stay after Lee Choy arrived?

A. They stayed a little over ten minutes.

Q. What did they do, just talk while they were there?

A. Well, they were talking, but I don't know what they were talking about.

Q. You were in the store all the time? A. Yes.

Q. Did Lee Choy say anything about how they were going to go to Kaneohe? A. No.

Q. Did Chin Tai say anything about it?

A. Well, Chin Tai told me, "Wait a little while

(Testimony of You Lum.)

and close up," he is going down in the country, that is all he told me.

Q. Did they say anything about going over in an automobile? A. No.

Q. Did they telephone for an automobile?

A. No.

Q. Where is the telephone, in the front part of the store or back part of the store?

(Witness and Interpreter talk in Chinese.)

The COURT.—Does he not know where the telephone is?

A. The telephone was close to the wall there in the front, or back,—

The COURT.—Which wall?

A. It was in the office in the back part of the store.

Q. The telephone was in the office in the back part of [372—292] the store, and Lee Choy and Chin Tai were up in the front part of the store, is that correct?

A. They were talking inside of the office, at the back part of the store.

Q. They were talking inside the office at the back part of the store, you say? A. Yes.

Q. Do you know whether they telephoned or not?

A. No.

Q. Did they telephone or didn't they?

A. No, they did not telephone.

Q. If they had telephoned you would have known it, wouldn't you?

A. Yes, if they telephoned I could see them.

(Testimony of You Lum.)

Q. You were in the store there with them all the time? A. Yes.

The COURT.—Did I understand you to say they arrived at the store in an automobile? A. Yes.

The COURT.—The automobile did not come there after you arrived?

A. No, I saw the machine and Lee Choy came in.

Q. Then you saw the machine outside, did you?

A. Well, I saw a machine outside. Of course I was busy, in and out selling goods.

Q. But you saw the machine outside as Lee Choy came in, is that correct? A. Yes. [373—293]

Q. And I presume that is the same automobile they went out to the country in?

Mr. ULRICH.—Objected to.

The COURT.—You might ask him if he knows.

Q. Is that the same automobile that they went to the country in? A. That is the machine.

Q. You are very sure of that?

A. Yes, that is the same machine they got on, ever since they went out I didn't see them any more.

Q. That automobile was standing there in front of the store from the time Lee Choy came in until they left? A. Yes.

Q. How do you remember now that this was the night of the 18th?

A. Well, I bought some tomatoes on that day.

The COURT.—What?

A. I bought some tomatoes on that day.

Q. Where did you buy them?

(Testimony of You Lum.)

A. From the peddler on the wagon.

Q. What kind of tomatoes? A. This round kind.

Q. Do you sell tomatoes in the store?

A. Yes, tomatoes and other things.

Q. Why did you buy tomatoes, for the store or yourself, that day?

A. I buy it for the store and for sale. [374—294]

Q. How many did you buy this day?

A. Four or five baskets.

The COURT.—What had the buying of these tomatoes to do with the date?

A. I bought the tomatoes. I put down there in the book so I can get money back from Chin Tai.

Q. Then you put in down in the books?

A. I put it on a piece of paper.

Q. Didn't you testify yesterday on the stand you entered it on the books?

A. No, I says put it on a piece of paper.

(Portion of testimony referred to read by Reporter.)

Q. Yesterday the stenographer has in his reports here that you entered it in the book, on two different occasions.

A. Well, I didn't say it was in the book, I says it was in a paper.

Mr. ULRICH.—(To Interpreter.) Is the Chinese word for book and the Chinese word for paper the same? My adviser says the question was asked yesterday the same as to-day. Ask the witness himself whether he says "book" or "memorandum"; aren't the words the same, or are they the same?

(Testimony of You Lum.)

The INTERPRETER.—Different. Book “hoo,” paper is “chee.”

Mr. ULRICH.—What is memorandum record, or something like that?

The INTERPRETER.—“Hoo.” [375—295]

Mr. ULRICH.—It can mean either “book” or “memorandum”?

The INTERPRETER.—Paper is different.

The COURT.—Have you any recollection as to what he did say yesterday?

The INTERPRETER.—He said book, entered in the book. “Faa chee,” memorandum, that is what he testifies to now.

Mr. ULRICH.—He says “put in book” or “put in paper.” Suppose you just want to say “made a memoraudum of it,”

The INTERPRETER.—Well, they got different words of saying, can say put in the book, put in the paper,—they call the memoranda anyway, or can say, “I put the memorandum in the book or in a piece of paper.”

The COURT.—What is your best recollection of just what he did say yesterday?

A. He says, “Entered in book, put it in a book.” This morning he says, “Put it in a piece of paper.”

Mr. PATTERSON.—Q. Now did you give this piece of paper that you made out to Chin Tai?

A. No, I did not give it to him, for I just kept that for a memoranda for my memory.

Q. You kept that for your memory. How many of these pieces of paper have you got?

(Testimony of You Lum.)

A. One piece of paper, I wrote that myself.

Q. Have you still got it? A. No.

Q. What did you do with it?

A. Threwed them away, burned them up. [376—296]

Q. When did you throw it away?

A. After he gave me the money I threw them away.

Q. When did he give you the money?

A. The same day.

Q. The 18th? A. Yes.

Q. When did you buy the tomatoes, what time in the day? A. In the morning.

Q. What time of the day did he give you the money? A. In the afternoon.

Q. And then you threw the piece of paper away?

A. Yes.

Q. And that piece of paper reminded you Lee Choy went to Kanoeha on the night of the 18th?

A. Yes, I remember that day he went down in the country.

Q. Is there anything else you did on that day?

A. Well, there is some other things, I do not remember now.

Q. Do you smoke opium? A. No.

Redirect Examination.

(By Mr. ULRICH.)

Q. You did not see these chickens and eggs coming back from Kanoeha, did you?

A. Yes, after they came back from the country I saw the chickens.

(Testimony of You Lum.)

Q. You did not see them brought into the place there? A. No. [377—297]

Q. All that you know is that you came there the next morning, that you found a box of eggs, and chickens in a box, that is right, isn't it? A. Yes.

Q. When you say they came in a box you say that merely because you saw them in the box the next morning, isn't that the idea?

A. Chin Tai told me that the chickens and eggs came from the country.

Q. What I am asking is, the reason you say the chickens came in a box is simply because you saw them in a box the next morning, isn't that right?

A. All I saw is just a box of chickens and the box of eggs, that is all I know.

Q. That is all you know?

A. That is all I know.

Q. You say there was automobiles standing outside your place there most of the time; is that right?

A. Yes, always machines standing outside.

Q. When you saw Lee Choy coming in the store that night first, he was coming in the door, isn't that what you said? A. Yes.

Q. You say that Lee Choy and Chin Tai were in the office in the back of the store talking in there, is that right?

Mr. PATTERSON.—We object to that on the ground that it is leading.

(Testimony of You Lum.)

The COURT.—I think that is proper re-direct. [378—298]

Q. Lee Choy and Chin Tai were talking together in the office in the back of the store; is that right?

A. Yes, they were talking inside the office.

Q. And they were talking in such a tone of voice you would not be able to hear what they were saying, didn't you say that?

A. No, I could not hear because I was selling goods.

Q. You were moving around back and forth in the front part of the store? A. Yes.

Q. You did not have them in sight all the time, did you?

A. No, there was a lot of people coming in the store buying goods.

Q. The telephone was in the office there, wasn't it? A. Yes.

(Witness excused.)

**Testimony of W. K. Richardson, for Defendant
(Recalled).**

W. K. RICHARDSON, recalled as a witness for the defendant, having heretofore been sworn, testified as follows:

Direct Examination.

(By Mr. ULRICH.)

Q. Mr. Richardson, without taking you over the testimony you gave the other day, I simply want to ask you about two questions. You testified before in this case that you saw Lee Choy at the wharf on

(Testimony of W. K. Richardson.)

the night of October 18th when the "President Wilson" was in port, along [379—299] about 7:30 or 8 or 8:30, somewhere about that time, in the evening. You testified at a later time you saw this woman, Mrs. Alapa, go on the boat. Now, I will ask you to the best of your recollection how much time elapsed between the time you last saw Lee Choy and the time you first saw this woman?

The COURT.—How much time between.

A. Ask that question again.

Q. About, to the best of your recollection, how much time was there between the time you last saw Lee Choy on that night and the time that you first saw this woman, that is to the best of your recollection? A. About one hour.

Q. Can you say from the best of your recollection that you didn't see one go up immediately followed by the other, or see them go up together or close together?

A. I did not see them go up together.

Q. And there was a period of what you would call about an hour? A. Yes, sir.

Q. It might have been more, so far as that is concerned, or might have been a little less, perhaps?

A. Yes.

Q. That is your best estimate of the time that elapsed between the time you last saw Lee Choy and the time you first saw the woman, is that right?

A. Yes. [380—300]

(Testimony of W. K. Richardson.)

Cross-examination.

(By Mr. PATTERSON.)

Q. Mr. Richardson, how long have you known Lee Choy?

A. Well, I have been down on the front now about seven months.

Q. Have you known him all that time?

A. Well, you see, the new boys are not generally put on—

Q. Have you known him all that time? You answer my question. A. About that.

Q. You have known him about seven months?

A. Yes, about that time.

Q. You have seen him repeatedly down there?

A. Yes.

Q. Every time you are on watch he is down there?

A. Generally he is around there.

Q. And you saw him on this night?

A. Yes, sir.

Q. And you testified the other day it was around 9 o'clock—the last time you saw him?

A. 7:30—8:30.

Q. So, Mr. Richardson, then you testified the other day it was about half-past 8 or 9 o'clock, the last time you saw this man going on board that night, didn't you?

A. That is the last time I seen him going off.

Q. And you also testified it might have been an hour or two later, didn't you?

A. Yes, it might have been. [381—301]

(Testimony of W. K. Richardson.)

Q. You are not positive of the time, are you?

A. Well, I am not positive whether he came back after half-past 8 or 9.

Q. You are not positive whether he came back or not? A. Yes, I am.

Q. He may have gone on board again?

A. He may have.

Q. He may have come off the boat again after that? A. He may have.

Q. He may have been down there at 10 o'clock?

Mr. ULRICH.—Objected to. Of course he “may have.”

(No ruling by the Court.)

Q. Did you know that he had a pass?

A. Oh, yes.

Q. Do you pay the same attention to people who go on and off the boat with a pass as those who do not have a pass? If you know they have a right to go on the boat do you pay as close attention to them as you do to others?

A. When they come first I look at it, after awhile I don't bother very much, excepting some new faces.

Q. So you are not willing to swear that Lee Choy was not down there about 10 o'clock, are you?

Mr. ULRICH.—Objected to,—all the witness can say is to the best of his recollection whether he saw him.

The COURT.—You say it is your positive recollection that he was there at half-past 8 or 9, that you are sure of? [382—302] A. Yes.

(Testimony of W. K. Richardson.)

Q. Have you any recollection at all of seeing him after that? A. No.

The COURT.—He cannot say one way or the other, I suppose.

Q. Mr. Richardson, you testified this morning that it might have been an hour later when he was there?

A. It might have been. I don't remember he came there or not.

Q. This time you testified he was there half-past 8 or 9 o'clock, you are not sure what hour, are you? A. Of that I am quite positive.

Q. That it was along about that hour? A. Yes.

Q. But he may have come down there and gone on board while you were on the watch and you don't remember it, is that correct?

Mr. ULRICH.—Objected to.

The COURT.—That is a possibility that the jury can determine. The witness has no recollection of it, of course. If he did go on after that, if that is possible, the jury can tell that.

Q. What time did this woman go on board?

A. About 9:30 to 10, between those two.

Q. Between 9:30 and 10? A. Yes.

Q. And you do not remember seeing Lee Choy after that? [383—303]

A. I don't remember.

Q. You don't remember that at all?

A. No, sir.

Q. You are positive she was not down there before 9:30? A. She was not down there before 9:30.

(Testimony of W. K. Richardson.)

Q. And have you talked to anybody about this case since you were on the stand the other day?

A. No, sir.

Q. Not a soul?

A. The boys where we work together, the boys where we are working, the boys like to get a little information, how the case went on.

Q. Nobody in this courtroom, nobody said a word to you since you were on the stand? A. No.

Q. Has Lee Choy talked to you about this case since then? A. No, sir.

Q. Have you seen Lee Choy since then?

A. No, sir.

Q. Haven't talked to him at all? A. No.

Q. You were just called up here like a bolt out of the sky?

A. I was surprised when I got home last night at a telephone message to report down here to court.

Q. But you are not sure of the hours are you; you are [384—304] not sure it was half-past 8 or 9 o'clock that Lee Choy was there?

A. Of that I am a little more positive.

The COURT.—Are you positive of the fact that you saw him, or are you positive of the fact as to the time, which is it? You are sure you saw him, is that it? A. Yes.

Q. But you are not sure as to the time, or are you sure as to the time?

A. I am quite positive of the time.

Q. But you are more positive of the fact that you saw him or did see him? A. Oh, yes.

(Testimony of W. K. Richardson.)

Q. It might have been as late as half-past 9 when you saw him, is that correct?

Mr. ULRICH.—Objected to, he has given the best of his recollection, half-past 8 or 9 o'clock. He may say it may have been so and so. We object to that whole line of examination.

The COURT.—I am inclined to think he has told us about all he knows about it.

Mr. ULRICH.—There is a certain line of evidence having to do with the question which I imagine the Court would not allow in evidence from the ruling of the Court before, that is the matter of the practice of prostitution and so forth. I do not want to get it before the jury. I do want to make my offer proof though. [385—305]

Mr. PATTERSON.—I have no objection to any offer of proof you wish to make in the presence of the jury.

The COURT.—You make no objection?

Mr. PATTERSON.—I have no objection to his making an offer of proof.

The COURT.—You understand, gentlemen of the jury, an offer to prove certain facts is not evidence and you are not to consider that. Questions are asked by counsel and there are objections to the question and the Court sustains the objection, and then counsel makes an offer of proof. Of course you will realize the question of counsel is not evidence, and you will not infer any facts from it. The same principle applies to the offer Mr. Ulrich is now about to make.

Mr. PATTERSON.—I much prefer that counsel should produce some witness on the stand and ask these questions.

Mr. ULRICH.—I will be very glad to do that.

The COURT.—I see no occasion for it. It seems to me the authorities are very clear that questions put to a witness on the stand for the purpose of testing credibility, not otherwise material, is not material to the issue before the Court. He is bound by the answer. You are not permitted to prove the contrary. What is the use of taking up the time of putting witnesses on the stand?

Mr. ULRICH.—I will make the offer in the presence of the jury if counsel so desires. We offer to prove, [386—306] if the Court please, by witness Fong Huan, that on a certain day last week, I cannot give the exact day, he had a conversation with this Japanese driver that has testified here. We offer to have him identified, in regard to the prosecuting witness, Mrs. Alapa,—that on this day he had a conversation with this Japanese driver concerning this woman. The Japanese driver told him that he could and would procure this woman for him for the purpose of prostitution, naming a price but that he would not do it until after the present case had terminated, mentioning this case, in which conversation this man assured him that he could get this woman, and that her price was so much.

Mr. PATTERSON.—Objected to, that has no

(Testimony of Lee Choy.)

more business here than a case that is being tried down to the police court.

The COURT.—The objection will be sustained. The Court will not permit such testimony. Remember, the offer is not evidence, gentlemen, you are not to consider it.

(Lee Choy, the defendant, and an Interpreter, called.)

Mr. PATTERSON.—He is Hawaiian-born Chinese, educated in the public schools of Hawaii. I submit he should speak in English and not use an interpreter.

The COURT.—I always considered it fair. You might question him in English if you see fit.

Mr. PATTERSON.—I am suggesting in this matter that he be tried out, he claims to be an American, he can speak English, and should so speak on the witness-stand. [387—307]

The COURT.—I will permit him to have an interpreter if he wants one.

Testimony of Lee Choy, in His Own Behalf.

LEE CHOY, the defendant, was called and duly sworn as a witness in his own behalf, and testified as follows: (Through the Official Chinese Interpreter.)

Direct Examination.

(By Mr. ULRICH.)

Q. Lee Choy, how old are you?

A. Twenty-six years old.

Q. Are you married or single? A. Married.

(Testimony of Lee Choy.)

Q. How many children have you?

A. Four children.

Q. Where do you live?

A. Vineyard Street on Cunha Lane, Number 4 Cottage.

Q. What is your occupation, Mr. Lee Choy?

A. I am working, driving a truck.

Q. And who are you driving a truck for?

A. Ah Chew Brothers.

Q. How long have you been driving a truck for Ah Chew Brothers? A. Eight or nine months.

Q. And before you entered the employ of Ah Chew Brothers as a truck driver, what did you do?

A. Rent service.

Q. How long did you drive in the rent service?

A. Over a year. [388—308]

Q. Now, as a truck driver for Ah Chew Brothers what salary do you make?

A. Twenty dollars a week.

Q. Do you have any other source of income, or have you anything else? A. Yes, I have others.

Q. Well, what else do you do?

A. Selling chicken and chicken eggs, that is for myself.

Q. Where do you get these chickens and eggs that you sell? A. Kaneohe.

Q. Any particular person over there or from several?

A. One of these men down there.

Q. This man Hoon Wai? A. Yes.

(Testimony of Lee Choy.)

Q. Lee Choy, do you know this Japanese taxi driver, Kamihara, who has testified in this case?

A. I know him now.

Q. How long have you known him?

A. Since I was arrested.

Q. Before you were arrested—by being arrested you mean arrested on October 18th?

A. No, I don't know him before that day of the 18th.

Q. Did you or did you not ever call him up at his auto stand or at any auto stand at a time about two or three weeks before the 18th and ask him to come down to Ah Chew Brothers place of business.
[389—309]

A. No.

Q. You did not? A. No.

Q. Did you at about that time, or did you not, take a ride in his car, going to Young Street and stopping on Young, going along Beretania Street, and going down the waterfront where you dismissed him, did any such ride ever take place?

A. No.

Q. Did he ever drive you to any woman's house?

A. No.

Q. Did you ever see this woman, pointing to the prosecuting witness in this case, Mrs. Alapa, before you were arrested and brought over to an automobile in which she was on the evening of October 18th?

A. No; I know her at present.

Q. That was the first time you ever saw her in

(Testimony of Lee Choy.)

your life when you were brought up in the automobile? A. The first time.

Q. Did you ever know where she lived before this case arose?

A. No, even now I don't know where she lives.

Q. You don't know where she lives excepting what you have heard in the testimony in this case?

A. Yes, I heard of the lane.

Q. Now, on the night of October 18th, you call that night to memory, do you, as being the night on which you were arrested? [390—310]

A. Yes.

Q. Starting out about 6 o'clock, we will say, on that evening, what did you do, where were you about six o'clock on that evening, if you remember?

A. I was at the store at that time waiting for the boat to arrive, so that I can take my boss down to the wharf.

Q. Well, after you had waited at the store there with your boss, where did you first go?

A. I waited in the store, my boss telephoned down the wharf asking if the boat arrived or not, if the boat arrived then I took the boss down to the wharf.

Q. And did you take the boss down to the wharf?

A. Yes, I did.

Q. By the boss whom do you refer to?

A. Lee Chuck.

Q. What time was it when you took Lee Chuck down to the wharf that night?

A. After six o'clock.

(Testimony of Lee Choy.)

Q. When you got down to the wharf, what did you do?

A. When I arrived down the wharf the steamer just alongside the wharf, we went upstairs. We waited there until they put on the gang-plank.

Q. That is you were there when the boat arrived. Did you go on the boat at that time?

A. The boss and I went on the boat.

Q. After the passengers had come off?

A. I get on the boat before the passengers left.
[391—311]

Q. Who did you see on the boat?

A. I saw a lot of passengers on the boat there and I went down in the kitchen. I asked those cooks downstairs, waiters, whether they want anything, potatoes or anything like that.

Q. Did the cooks or waiters give you an order for any potatoes or vegetables or anything of that sort at that time?

A. He told me—I was busy at that time, he told me to come around there again.

Q. Well, after you had had this talk with the cook or waiter what did you do?

A. Came on shore,—the wharf.

(Recess.)

Q. And after you came to the wharf, where did you go?

A. When I got on shore I waited a little while, and the boss came off and then I took him home.

Q. Took him home?

A. Drove him home, drove him to the store.

(Testimony of Lee Choy.)

Q. What were you driving, what kind of machine? A. Dodge machine, touring car.

Q. Belonging to the company for which you worked? A. Yes, belonging to the company.

Q. About what time was it that you took the boss home? A. About 7 o'clock.

Q. And after you had taken him home what did you do?

A. I took half a dozen canned mile home to my house.

Q. Where is your house? [392—312]

A. Vineyard and Cunha Lane.

Q. And when you had taken this witness' mile home did you stay there for any length of time?

A. As soon as I left the condensed mile home I told my wife I am going down to the boat.

Q. And did you go down to the boat? A. Yes.

Q. And did you—by the boat to which you have referred you mean the "President Wilson" do you?

A. Yes, "President Wilson."

Q. How did you go down to the boat the second time? A. I got the street-car going down.

Q. When you had taken the boss home in the Dodge car and gone to your house, how had you gone to your house? A. I walked home.

Q. As near as you can remember, Lee Choy, when was it, what time was it when you got down to the boat the second time? A. About after 7.

Q. Well, can you fix it more closely than that?

A. I could not say, I noticed it was after 7 o'clock, —because I didn't have no watch with me.

(Testimony of Lee Choy.)

Q. When you got down to the boat the second time what did you do?

A. Went on the boat and asked those passengers on the boat if they wanted anything, any goods, and at the same time I went down in the kitchen and asked the cook [393—313] if they want any stuff, they says no, they had a lot of stuff brought from Japan.

Q. Do I understand you to say you spoke to some of the passengers on the boat? A. Yes.

Q. What did you have in mind to sell to those passengers? A. Vegetables and Chinese stuff.

Q. Had you sold any to passengers on boats before? A. Yes.

Q. Each time when you went on the boat did you see Inspector Richardson, the man who testified here, a customs inspector? A. Yes.

Q. Where was he? A. At the step.

Q. At the after-end of the gang-plank?

A. The first time he was standing at the gate, near the gang-plank, there is a gate there. He asked me for my pass and I show him my pass and the second time I went down there he was there standing at the gang-plank.

Q. Do you know whether you showed him your pass the second time?

A. The second time I don't remember whether I showed him the pass or not, but I also saw the two officers standing at the gang-plank. They saw me too.

Q. By the two officers to whom do you refer?

(Testimony of Lee Choy.)

A. Wells, and another tall man.

The COURT.—Is he in the courtroom? [394—314]

A. Yes, these two.

(Indicating Mr. Wells and Mr. Stevenson.)

Q. These two gentlemen sitting at the end of the front row there? A. Yes.

Q. When you went on the boat the second time did you see the same cook or steward as you had spoken to the first time there? A. Yes, same cook.

Q. Now aside from the passengers to whom you have spoken, trying to sell them something, and this cook or steward, to whom you spoke, did you speak to anyone else on that boat either time you were down there? A. Talking to passengers.

Q. But aside from the passengers and the cook to whom you spoke about selling some vegetables, did you speak to anyone else, any Chinese people particularly?

A. Well, others besides those passengers, I asked them if they wanted potatoes or anything like that, vegetables, fruits.

Q. You mean you just spoke to a few people whom you happened to meet about vegetables and fruits? A. Yes.

Q. Well, is there any person, any Chinese person, aside from the cook or steward, to whom you spoke about selling goods for the boat itself, whom you can remember, to the extent of being able now to identify or say who they [395—315] were?

(Testimony of Lee Choy.)

Mr. PATERSON.—Objected to as already answered.

The COURT.—Objection overruled.

A. I know he was working on the boat, I could not say whether he was a cook or waiter, I seen him working on the boat.

Q. Did you go anywhere on the boat excepting this kitchen where this steward was?

A. Came upstairs on the deck and asked the passengers.

Q. During either time you were on that boat did you come into the room where there were Chinese persons dressed as though they were resting from their work?

A. I went in the room, there is a lot of Chinese waiters all dressed up in the room, I asked them if they wanted potatoes or anything like that.

Q. At either time you were on that boat did you go into any first-class stateroom?

A. No, I have no right to go in those rooms.

Q. About what time was it that you left the boat on this second visit?

A. When I arrived home it was after 8 o'clock.

Q. When you arrived home it was after 8; about how long after 8?

A. I did not look at the time; I think it was about after 8.

The COURT.—What time after 8?

The INTERPRETER.—He says he could not say.

The COURT.—It might be 1 minute after 8 or

(Testimony of Lee Choy.)

59 minutes, [396—316] after eight, and still be after 8. A. I could not say.

Q. How did you get from the boat home the second time you went home?

A. When I came down to the wharf the street-car just passed, and I walked up here to Fort Street, Fort and King Street, by the First National Bank there, I got my car there, took street-car.

Q. When you left the boat the second time, reaching home sometime after 8, was that the last time that you were on that boat?

A. Yes, that was the last time.

Q. And when you left the wharf on that occasion was that the last time that you were at that wharf that night? A. The last time.

Q. Well, after you had gone home, how long did you stay there?

A. Didn't stay very long, go in the kitchen and got a towel, washed my face, then I told my wife, "I am going down to the country to-night."

Q. Well, after you washed your face and told your wife you were going down to the country, where did you go?

A. I came in town to Chin Tai's store.

Q. Who did you find at Chin Tai's store?

A. I saw Chin Tai and one of his working men in the store.

Q. Was that working man the man who testified here this [397—317] morning? A. Yes.

Q. As near as you can remember about what time was it that you arrived at Chin Tai's store?

(Testimony of Lee Choy.)

A. When I left my house I came down the little lane there, I saw a clock in the store that said 8:40.

Q. That is as you were leaving your house to go to Chin Tai's store?

A. I saw the clock in the lane.

Q. In the lane as you were leaving the house?

A. In the lane, not the lane where I lived but the lane down here, the second Cunha Lane, not the same lane where I live, the second lane.

Q. But before you get out into Vineyard Street?

A. There was two lanes, one Vineyard Street lane, leading mauka side, one Vineyard Street lane leading down to Kukui Street.

Q. Where you saw this clock, 8:40, you were only about a few hundred yards from your house?

A. On Kukui Street, between near the bridge there, I saw a store there and looked at the clock; it was about 10 minutes to 9.

Q. That would be 8:50 wouldn't it. Well, after you got down to Chin Tai's store and found Chin Tai and this clerk of his there, what did you do?

A. When I went in there I saw Chin Tai was inside the office writing, and I asked him if he wanted some eggs.

Q. You mean you asked him? [398—318]

A. I asked Chin Tai if he want some eggs. I told him I am going down the country, "Would you mind go along with me?" and he said, "All right, I will go."

(Testimony of Lee Choy.)

Q. Did you get an automobile to go down into the country?

A. Yes, I did, I telephoned for a machine.

Q. Where did you telephone to?

A. I telephoned to Smith Auto Stand, Chinese Auto Stand on Smith Street.

Q. And did a machine come to get you?

A. Yes.

Q. And who was the driver of that machine?

A. Won Tim.

Q. The man who testified here yesterday?

A. Yes.

Q. And you and Chin Tai got into the automobile and went at once to the country with Won Tim, is that right? A. Yes.

Q. About what time was it when you left Chin Tai's store to go down to the country?

A. After 9 o'clock.

Q. How long after 9? A. I could not say.

Q. It was about, near what time?

A. I know it was after 9 o'clock. I didn't have any watch with me.

Q. How long do you think you were in Chin Tai's store? A. I think about 10 or 15 minutes. [399—319]

Q. How long had it taken you to get from the place you saw the clock to Chin Tai's store?

A. A few minutes.

Q. Going down to the country, how did you sit in the automobile? A. In the back seat.

Q. You and Chin Tai in the back seat? A. Yes.

Q. And the driver alone in front? A. Yes.

(Testimony of Lee Choy.)

Q. What kind of car was it? A. A "Hudson."

Q. Going down to the country did you drive rapidly or at a moderate rate of speed?

A. Well, we didn't go very fast; didn't go very slow.

Q. And on your way down to the country did you go over the Pali and directly down to Kaneohe without stopping anywhere? A. No.

Q. Did you stop anywhere on the way down?

A. No, we stopped at Hoon Wai's place.

Q. But no place on the way, is that it? A. No.

Q. When you got to Hoon Wai's store what did you do?

A. I told the driver to wait for us outside, and I called Chin Tai go inside the house.

Q. Did you go inside the house? [400—320]

A. Yes, I went on the veranda and at the same time Hoon Wai came out from his office and meet us at the veranda.

Q. As near as you can remember what time was it when you got down to Hoon Wai's store?

A. 10 o'clock, to Hoon Wai's house, not store, about 10 o'clock.

The COURT.—About 10 o'clock, you say?

A. About 10 o'clock.

Q. That you arrived at Hoon Wai's House?

A. About 10 o'clock.

Q. Where is Hoon Wai's house?

A. It is a little lane going in his place, the car stopped right outside of his house.

Q. With respect to the courthouse at Kaneohe where is his house?

(Testimony of Lee Choy.)

A. Past Koolau Court House there is a line of stores there, past the Japanese blacksmith-shop, there is two store there, on one side a Chinese store and on one side a Japanese store, and right in that lane there.

Q. Did the driver come in the house with you or did he stay in the automobile?

A. The driver did not come in.

Q. Did not come in? A. Did not come in.

Q. Well, when you went into Hoon Wai's house what happened? What did you do?

A. He asked us to sit down for tea and says, "You fellows [401—321] come in pretty late."

Q. Did you have tea?

A. Yes, he brought the tea out and we drank some tea.

Q. Well, when you had your tea what else did you have?

A. We went in the office and I asked Hoon Wai,—we came in for some eggs and some chickens, and asked if we could have some; he says, "Yes, you could have some."

Q. Did you get any eggs? A. Yes, I got some.

Q. How many eggs did you get?

A. Counted 300 eggs.

Q. What did you do with those 300 eggs?

A. Put them in a box.

Q. What did you do with the box after you put the eggs in it?

A. After we put the eggs in the box we went out to get the chickens.

(Testimony of Lee Choy.)

Q. And what did you do, get some chickens?

A. We got chickens while Hoon Wai was getting the sack, in order to let the chickens stick their head out while I was taking eggs to the machine.

Q. How many chickens did you get?

A. Six chickens.

Q. How much did you pay Hoon Wai for the eggs? A. I paid one dollar for 20 eggs.

Q. Bought them at the rate of 20 for a dollar?

A. Yes.

Q. Did you pay him anything for the chickens?
[402—322]

A. Well, I give him fifty dollars, I owed him some money before; I gave him fifty dollars and told him we would fix up the difference later on.

Q. When you got your chickens and eggs what did you do with it, where did you put them?

A. I brought it down to Chin Tai's place.

Q. Where did you put them? How did you bring them to Chin Tai's place?

A. I put the eggs in a machine in the back seat and the chickens, the driver tied it on behind on the running-board.

Q. What is it, the tire or the running-board?

A. The extra tire on the running-board, the fender.

Q. How long a time, as near as you can remember, was it that you stayed there at Hoon Wai's place at Kaneohe that night?

A. I think about three-quarters of an hour or one hour, counting those eggs, things like that.

(Testimony of Lee Choy.)

Q. So that you took your chickens and eggs on the automobile, stayed there for three-quarters of an hour or an hour. Did you come back to town?

A. Yes.

Q. Did you come straight back from the Pali to Chin Tai's store? A. Yes.

Q. Did you stop anywhere on the way coming back from Hoon Wai's place to Chin Tai's store?

A. No. [403—323]

Q. When you got back to Chin Tai's store did you keep the automobile or dispose of it?

A. I paid him off and he went off.

Q. How much did you pay him?

A. Six dollars.

Q. And then what did you and Chin Tai do?

A. Took the chickens inside there and untied the chickens, got a box, weighed them on the scales first, and then put them in a box, put the chickens in a box.

Q. What did you do with the eggs?

A. Leave them in there on the same box.

Q. Well, about what time was it that you got back to Chin Tai's store?

A. I don't remember about what time, I didn't look at the clock.

Q. Have you any idea? Can you give us your best recollection?

A. I don't remember. I think it was about after 11 o'clock.

Q. Do you know what time it was that you left Hoon Wai's place?

(Testimony of Lee Choy.)

A. We left in town here about after 9 o'clock, when we arrived there I think about 10 o'clock. I didn't look at the time we left there. I don't know what time it was.

Q. But you stayed there about an hour or three-quarters of an hour? A. Yes.

Q. Well, what else did you and Chin Tai do in the store [404—324] there besides putting the chickens and eggs away?

A. He was in his office and I was outside waiting for him.

Q. Well, did you eat any eggs in there?

Mr. PATTERSON.—Objected to, on the ground it is leading.

The COURT.—He is allowed to put leading questions after apparently exhausting the witness' memory.

A. Well, I heard the clock strike, that time I looked at the time, it was 12 o'clock, I told Chin Tai I was going home, he say, "You wait, I will boil some eggs; have some eggs before you go."

Q. Did you cook any eggs? A. Yes.

Q. You remember that was some time after midnight? A. Yes, it was after 12.

Q. Now do you know where Chin Tai got these eggs you cooked, whether they were taken out of the box that you brought back from Kaneohe or whether they were other eggs he had in the store?

A. Those eggs we brought in down from Kaneohe.

Q. You cooked some of those? A. Yes.

(Testimony of Lee Choy.)

The COURT.—How many did you cook?

A. Well, I don't know how many. I know I ate three or four eggs.

Q. All right, after you got your midnight lunch there what did you do?

A. I told Chin Tai I was going home, and Chin Tai rang [405—325] for an automobile, and he rang for the automobile but could not get the automobile, then I rang the automobile.

Q. Then you rang for one automobile first, first you could not get it, or Chin Tai did and then you rang up an automobile stand?

A. Chin Tai rang first, could not get any machine, then I rang and got one.

Q. What did you get this machine for?

A. Oh, for the purpose of taking Chin Tai home, he was going home.

Q. Well, did the automobile come for you?

A. Yes, I got the machine.

Q. And did you and Chin Tai get in the machine and go somewhere? A. Yes.

Q. About what time was it that you and Chin Tai left his store there, in this automobile, about what time? A. That was after 12 o'clock.

Q. Well, it was after 12 o'clock you had had your eggs. Can't you say about how long after 12 o'clock?

A. I did not watch the clock all the time, but I could not say either what time, the only time I saw the clock was when the clock struck 12.

Q. And after the clock struck 12 then you had

(Testimony of Lee Choy.)

your eggs, and as soon as you were through with your eggs you went out that night?

A. After we had our eggs then we telephoned for the [406—326] machine.

Q. All right. After you got in this machine who were in the car? A. Chin Tai and myself.

Q. And the driver? A. Yes.

Q. Where did you go?

A. I want to go home. Chin Tai says we take a ride around before we go home.

Q. And when Chin Tai said, "We will take a ride around before we go home," where did you ride to?

A. We drove on Hotel Street, then there is a road near the Palace ground, Chin Tai said, "We better turn down this way, this is good road," and I said, "It is up to you," and we turned down the road next to the Palace.

Q. Turned down Alakea Street?

A. Richard Street.

Q. Where did you go then?

A. Came down Richard Street around the waterfront and up Fort Street.

Q. Now before you came up Fort Street, before you got to Fort and Merchant Street, did you stop anywhere along the waterfront or do anything except to go straight along the route you have told us about? A. No, did not make any stop.

Q. All right. When you came up Fort Street what happened?

A. When we came out Fort Street, near Mer-

(Testimony of Lee Choy.)

chant Street, as the machine passed us, Chin Tai was sitting on the right-hand [407—327] side of the seat, in the back seat, he put his head out and said, "Hello, Mac."

Q. You mean to say as the machine passed you or as you passed the machine?

A. We passed their machine.

Q. Going up Fort Street you overtook another machine, and what's his name, Chin Tai, called out, "Hello, Mac," is that right? A. Yes.

Q. Had you noticed who was in that machine before Chin Tai called out, "Hello, Mac"?

A. No, I did not know.

Q. Well, after Chin Tai called out, "Hello, Mac," what happened?

A. I heard someone say, "Stop."

Q. Well, after that?

A. Chin Tai opened the door and got off the machine, went to watch McDuffie, McDuffie came toward our machine. They met half-way.

Q. What did you do? What else happened?

A. Wells came over to the machine, pointed at me and says, "This is the Chinaman."

Q. What did he point at you?

A. He say, "Well, this is the man."

Q. Well, did you get out of the machine at all?

A. And afterward he told another man that come and take me over to their machine, and ask the lady to recognize me. [408—328]

Q. When you got over to the machine you saw that woman, did you?

(Testimony of Lee Choy.)

A. When I went to their machine and one of the officers flashed a light on me, on my face, and they asked the Japanese if he knows me, the Japanese says, "No, no savee."

Q. Was that Japanese this Japanese who sits here, Kamihara? A. Yes.

Q. Well, what else happened?

A. Then they asked this woman.

Q. What did she say?

A. What she said that time I don't know.

Q. And by this woman you mean the woman who sits here, Mrs. Alapa, who has testified in this case?

A. Yes.

Q. And when you were brought before that woman then and she was asked if you were that man, is that the first time you ever saw that woman?

A. The first time I saw her.

Q. Well, after you had been shown the woman, and she made this response, which you don't know, what happened?

A. The officer put me on the machine with her.

Q. You sat down beside her?

A. We were sitting on the same seat, I was sitting on the right-hand side, she was sitting on the left-hand side.

Q. Was anybody else sitting on the left-hand side there [409—329] besides you and the woman?

A. The chief of detective in the middle,—the chief of detectives was sitting on the door.

Q. Were you sitting next to the chief of de-

(Testimony of Lee Choy.)

tectives, nearest to the chief of detectives, or was the woman sitting nearest to the chief of detectives?

A. The chief of detectives was sitting right alongside the woman.

Q. He was sitting out on one side of the door, and you two were on the back seat, isn't that what you said?

A. I was sitting on the right-hand side, the woman sitting on the left-hand side, the chief of detectives sitting on the door on the left-hand side, close to the woman.

Q. In that way you drove to the station, did you?

A. Yes.

Q. While you were sitting there next to the woman, and the chief of detectives sitting on the door, do you remember having said anything to the woman?

A. No, I have no reason whatever to say anything to her. I don't know her.

Q. Will you state that you did not state anything to her? A. No.

Q. You won't state it or you did not state it?

A. I did not open my mouth at all.

Q. Did you nudge her or move over close to her, particularly, or anything of that sort?

A. No, since I sit on the machine she move away from me. [410—330]

Q. Was anything said to you when you were taken into custody, there, put into this automobile with this woman, as to what you were being arrested for? A. No.

(Testimony of Lee Choy.)

Q. Well, when you were taken down to the police station what was done?

A. Billy Wells said, "Lock him up."

Q. Well, what happened?

A. They locked me up.

Q. Did you—Before you were locked up were you told what you were charged with, why you were being locked up? A. No.

Q. Where were you locked up, in the police station?

Mr. PATTERSON.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

A. The police station, then they took me down in a cell.

Q. Did you see this Japanese driver there when you got to the police station?

A. No, I did not see him.

Q. You don't know what was done with him?

A. I know the next morning, but that night I didn't know.

Q. How long were you kept in the police station there before you were let out?

A. Locked up down there since Wednesday night until Saturday noon. [411—331]

Q. You say you did not know what had become of this driver until the morning. Did you see him the next morning?

A. I saw him in the jail yard there. I saw him sitting alongside the guard and I was down on the bench, sitting on a bench.

(Testimony of Lee Choy.)

Q. At any time while you were locked up there in the police station did you ever say anything at all to this Japanese, Kawahara, who was also there?

A. I could not say anything to him because we were separated, he was sitting alongside the guard, I was walking along there, and the guard told me, "You had better stay away from this Japanese."

The COURT.—The question was, "Did you say anything to him"? A. No, I did not.

Q. Is it true or is it not true, as he testified, that you met him the next morning near the lavatory there and said to him, "You say that you don't know me, I will say that I don't know you." Did you ever say that? A. No.

Q. Did you ever meet him near the lavatory or anywhere else?

A. No, he is crazy. If I want to go to the toilet I get a key from the guard.

Q. You saw the Chinese woman who testified here yesterday, Tan Lee Shee, you saw her here yesterday morning, did you not?

A. Yes. [412—332]

Q. Did you ever know her before this case arose?

A. Yes, I know her before that, she was running a store. I used to go in her store and buy cigarettes.

Q. Where was her store?

A. Hotel Street, near Nuuanu.

Q. Aside from the times you may have seen her

(Testimony of Lee Choy.)

in the store as you came in to buy cigarettes, did you ever see her anywhere else?

A. No other place.

Q. Before this case arose did you know what her name was? A. I heard about the name.

Q. How long had you known her name?

A. I heard of her name when I saw her taking the stand here.

Q. My question is, before this case arose, when you used to go in and out there and buy cigarettes, did you ever know what her name is?

A. No, at that time I do not know what her name was.

Q. Did you know where she lived?

A. I do not know where she lived. I know before when she was running the store at Hotel Street.

Q. That is, did you know where they lived in the store at that time?

A. I don't know where they stayed.

Q. You don't know where they stayed even then?

A. No. [413—333]

Q. Have you ever been to the home of this Chinese woman?

A. Before that I didn't go, after that Billy Wells told me that I took some opium to her place, then I went to her place and asked.

Q. You mean after you were arrested Wells told you you had taken some opium to her place, when you were released you asked her whether she had said that or not?

(Testimony of Lee Choy.)

A. Yes, I went to ask her whether I had taken opium there or not.

Q. You know whether you had taken opium there or not? Did Wells say she had said you had taken opium there? A. Yes.

Q. You went to ask her whether she said it or not, didn't you?

A. I went up to this Chinese woman's place and asked her if her place was searched, she say, "Yes," and she asked me who told me that, I told her, "Billy Wells."

Q. This was after you were released? A. Yes.

Q. Well, I am not talking about that time. I want to know, before your arrest, were you ever at her house? A. No.

Q. And before your arrest did you know where she lived? A. I did not.

Q. I take it from your testimony then that the testimony [414—334] given by this woman to the effect that you employed her to go on this boat and get opium is entirely false?

A. It is false. I do not know her.

Q. Did you ever have anything at all to do with smuggling opium into the Territory or any other place? A. No.

Cross-examination.

(By Mr. PATTERSON.)

Q. Do you know what opium is?

A. I saw opium in China. I did not see any in these Hawaiian Islands.

Q. You saw opium in China? A. Yes.

(Testimony of Lee Choy.)

Q. Did you see these opium cans herein court?

A. Yes, first time I ever see now.

Q. Did you ever see an opium pipe in the Hawaiian Islands?

A. No, I don't know, I don't smoke opium, I don't go near the opium joints.

Q. You have never seen an opium pipe then, is that correct?

A. I saw in China, but not in Hawaiian Islands.

Q. You have never seen an opium horn?

A. I saw the opium horn they used to sell in the Chinese stores.

Q. You never saw a pair of opium scales?

A. I saw the scales. [415—335]

Q. Here or in China?

A. I saw scales in China, also Hawaiian Islands, in the Chinese drug-store.

Q. You never did see any opium at all in the Territory of Hawaii? A. No.

Q. Do you know opium when you smell it?

A. I don't know. I never smelled opium before. I could not tell.

Q. Did you ever hear that there are certain Chinese in Honolulu that smoke opium?

A. Well, even when I heard it I don't pay any attention.

Q. This opium business around Honolulu is a big mystery to you, is that correct?

A. Well, I don't pay any attention to opium at all.

(Testimony of Lee Choy.)

Q. Did you ever know anyone who was arrested for smoking opium?

Mr. ULRICH.—Objected to.

The COURT.—I will permit this question.

A. I saw 40 or 50 Chinamen up in court here the other day, arrested while I was up here.

Q. Do you know Tom Leong, this woman's husband, the woman that testified?

A. Yes, I know him when I see him.

Q. Did you see him up in court here the other day with these other 60 people?

Mr. ULRICH.—Objected to. Suppose he knows the man when [416—336] he sees him.

A. Well, I did not see him. There was a big bunch here. I could not say which was which.

Q. You do not know whether he was here or not then, is that correct?

A. No, I do not know, only what I heard, all these people are arrested for opium.

Q. You know Tom Leong when you see him?

A. Yes.

Q. When did you last see him?

A. Well, I don't know when was the last time I saw him, but I saw him on the street.

Q. Did you see him out at his house?

A. I saw him when I was arrested, when I went up to the house to get the woman for a witness.

Q. Who did you go up to the house with?

A. I went up there to find his house, finally I found his house.

Q. Who went with you?

(Testimony of Lee Choy.)

A. I went there myself.

Q. Was Chin Tai along? A. No.

Q. Did you drive the car up there?

A. No, I walked up there; that was on Sunday.

Q. You walked up? A. Yes.

Q. And did you—Do you own an automobile?

A. At the present time I have not got any automobile. [417—337] Before I had automobile, before.

Q. Whose automobile did you drive down here this morning?

A. That is my brother's machine.

Q. What is the name of your brother?

A. Ah Chan.

Q. How do you spell that last name?

A. C-h-a-n.

Q. You have used that automobile to-day?

A. I always use that automobile, he don't use it until in the evening, he take country runs.

Q. You don't own any interest in that automobile?

A. That machine was mine before, when I quit the rent service business I went to work and I turned the machine over to my brother, who is paying the note now. He is paying the note.

Q. Who to?

A. That machine I bought from the American-Hawaiian Garage, and when I turned it over to him he is paying the note now. I transfered the machine over to him.

Q. When?

(Testimony of Lee Choy.)

Mr. ULRICH.—I am going to object, if the Court please. The broadest latitude—

The COURT.—What bearing has that upon the case?

Mr. PATTERSON.—I will withdraw the question at this time. I will take it up later.

Q. Where were you born?

A. Born in the Hawaiian Islands.

Q. Did you go to China at some time during your life? [418—338]

A. I went to China twice.

Q. When was the first time?

A. When I first went to China I was very small. My mother took me to China and stayed there 9 years, 9 or 10 years.

Q. The second time?

A. And the second time I went to China, came back here, was about 7 years ago.

Q. And you are 26 years old now?

A. Twenty-six years old next month, December.

Q. So when you made your second trip to China you were about 19 years old, is that correct?

A. Either 18 or 19, I am not sure.

Q. How long did you stay on that trip?

A. The second time when I went to China I stayed there not quite one year, then I came back to Honolulu. It was about 7 years ago when I came back.

Q. Did you go to school in Honolulu? A. Yes.

Q. What school did you go to?

A. Went to night school first.

(Testimony of Lee Choy.)

Q. Did you ever go to the public schools?

A. No.

Q. When you got back from China the second time you were about 9 years old, and you did not go to the public schools, is that correct?

A. When I first came back here I was over 10 years old. I went to Iolani school. [419—339]

Q. Is that one of the public schools?

A. No, that is not a public school.

Q. Who runs that school? A. Bishop school.

Q. For how long did you go there?

A. One year.

Q. Then where did you go to?

A. Frank Damon's school at Nuuanu Street, before.

Q. For how long? A. Just a few months.

Q. Did you ever go to any other school?

A. I have been at the school at Kaimuki, Honolulu School for Boys, now H. M. A., and stayed there six months.

Q. What grade were you in there?

A. Either third grade or fourth grade, I forget that.

Q. What other school did you go to?

A. That is all.

Q. What night school did you go to?

A. St. Mary's School, Palama.

Q. What is the name of that school?

A. St. Mary.

Q. How long did you go there?

A. One or two months at night school.

(Testimony of Lee Choy.)

Q. Which was the last school you went to?

A. Kaimuki, the last one.

Q. That is the Honolulu Military Academy?

A. Well, they call that place Honolulu School for Boys.

Q. How old were you when you left that school?
[420—340]

A. I don't remember.

Q. Did they speak English in that school out there? A. A lot of Chinese boys there.

Q. It is an English school though? You are taught English out there?

A. English school.

Q. The instructors do not talk to you in Chinese, they talk to you in English, don't they?

A. They speak to me in English, sometimes they don't understand they get another student there to interpret.

Q. You can talk English, can't you?

A. A little bit.

Q. Now, you can understand what I am saying now?

A. Some of it I understand, some I don't.

Q. If I asked you how old you are in English do you understand that?

The COURT.—Do you understand that?

Q. How old are you, Lee Choy?

A. (Witness speaking in English.) Twenty-six.

Q. Where do you live? A. I live Cunha Lane.

Q. Where? A. Number 4.

(Testimony of Lee Choy.)

Q. What kind of a house? A. Two houses.

Q. Two houses. How many rooms?

A. My house one room, another house a different fellow live. [421—341]

Q. Tell the jury what kind of a house you lived in.

A. Two houses. I lived one side, another man lived another side.

Q. How many rooms in that house?

A. One bedroom.

Mr. ULRICH.—We do not dispute the man can speak English. He can understand Chinese better. Is there any reason for further demonstrating it.

The COURT.—I think it is proper in this state of the case.

Q. Now, when you went down to the boat that night you saw the passengers on there, and you say, —speak in English, if you do not understand me say so,—you saw the passengers down there the night you were on the boat? A. Oh, plenty.

Q. Did you try to sell vegetables to the passengers? A. You mean I sell to passengers?

Q. Yes? A. No.

Q. Did you try to sell? A. Yes.

Q. You tried? A. Yes.

Q. What kind of passenger, haole passengers?

A. No, Chinese.

Q. Did you try to sell to haole passengers?

A. (Through Interpreter.) If they buy I would sell to them. [422—342]

(Testimony of Lee Choy.)

Q. Did you ask any haole passengers to buy that night?

A. (Through Interpreter.) No, I did not, they all come to shore.

Q. Did you ask Chinese passengers.

A. (Speaking in English.) Yes.

Q. Were there any passengers on that boat that night? A. Yes.

Q. How many? A. I don't know.

Q. You tried to sell them potatoes, is that right?

Mr. ULRICH.—How long is this cross-examination going to continue without the interpreter. I think this man has some difficulty in answering though he may be able to understand very well. The testimony should come to the jury in the best form. I think the jury now know about how well the man understands English. I think the purpose of the examination so far has been made, and that the examination may now continue in Chinese.

Mr. PATTERSON.—I want to take issue on that.

The COURT.—I will permit a few more questions. Inform the witness if he has any difficulty at all in understanding to make it known.

(Interpreter talks to witness.)

Mr. PATTERSON.—I would like to say at that time I would like to conduct the full cross-examination of the witness in English.

The COURT.—I am not ruling on that at this time. What I may do in the future I will not now undertake to state. [423—343]

(Testimony of Lee Choy.)

Q. So you tried to sell some of the Chinese passengers some potatoes that night?

A. (Witness continues in English.) I asked them if they want apples, oranges, corn, cabbages.

Q. Potatoes? A. Oh, any kind.

The COURT.—Vegetables of any kind, is that what you mean? A. Yes.

Q. You did not sell any at all? A. No.

Q. How long did you talk to the cook?

A. Oh, not too long.

Q. When you first went down there did you go right down to the cook's room?

A. No, I went on top of steamer, then I went down.

Q. Where was the cook?

A. Oh, down the room.

Q. Your room? A. At the steamer.

Q. In his own room? A. I don't know.

Q. Was he inside the bedroom laying down, or what was he doing?

A. Oh, plenty men there.

Q. What was he doing? [424—344]

A. Well, I don't know what these are doing.

The COURT.—I am inclined to think now that is sufficient, Mr. Patterson.

Mr. PATTERSON.—May it please the Court, I am strongly in favor of conducting the cross-examination of this witness in English.

The COURT.—That may be, Mr. Patterson—

(Testimony of Lee Choy.)

Mr. PATTERSON.—I think that the witness has shown himself able to speak in English. In other words, we have gone along here fairly well at least, asking and answering questions in English. I maintain that if the jury gets the question direct and the answer direct from the witness they are doing a lot better than through an interpreter.

(Argument.)

The COURT.—Do you want to testify in Chinese or English from now on?

WITNESS.—I would rather speak in Chinese because I know better in Chinese. Some of them I don't know.

The COURT.—I think you have examined in English sufficiently to give the jury some idea or knowledge of his ability to speak and understand the English language. That is the only purpose in admitting it. The objection will be sustained.

(Adjourned until 9 o'clock A. M. Thursday, November 16, 1923.) [425—345]

In the United States District Court in and for the
Territory of Hawaii.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

(Testimony of Lee Choy.)

On Thursday, November 16, 1922, at 9 o'clock A. M., all parties being present as before, the following further proceedings were had and testimony taken:

(Jury all present.)

LEE CHOY, the defendant, resumed the stand and continued his testimony as follows: (Through the official Chinese Interpreter.)

Cross-examination (Continued).

(By Mr. PATTERSON.)

Q. Who cooked the eggs that night that you arrived at Chin Tai's place? A. Chin Tai.

Q. What did he cook them in?

A. I do not know how he cooked it in. After the eggs were cooked he brought it outside.

Q. What kind of kettle,—cooked in a pan or kettle? A. That I don't know.

Q. Did you have anything else except eggs?
[426—346]

A. Beer, light beer.

Q. Near beer? A. Near beer.

Q. It was not home brew, was it, Lee Choy?

A. No, it came in a bottle.

Q. Were these eggs fried?

A. Half-boiled eggs.

Q. You had beer and boiled eggs then? A. Yes.

Q. About what time of the night was it you were eating these boiled eggs? A. After 12 o'clock.

Q. How long after?

(Testimony of Lee Choy.)

A. I could not say near what time. I know it was after 12. I didn't look at the time.

Q. Chin Tai said you ate half a dozen eggs, is that correct, he said you cooked a dozen eggs? A. No.

Q. How many did you cook?

A. I don't know how many he cooked.

Q. Well, about how many?

A. I don't know how many, I know I ate a few of them.

Q. And did you take them out of the box?

A. I saw they took the eggs from the box.

Q. Who took them out, Chin Tai? A. Yes.

Q. That is the same box you brought back from Kaneohe? [427—347] A. Yes.

Q. He had to open the box to get the eggs out?

A. The box came open, didn't nail up.

Q. This Chinaman that works in Chin Tai's store, he said that he counted the eggs the next morning and there were 300, he must have been mistaken?

A. I don't know whether he mistaken or whether Chin Tai told him that 300 eggs.

Q. But he said he counted them?

A. I don't know; I didn't see him count.

Q. But if he counted 300 eggs in the box you made a mistake because you and Chin Tai took out some the night before, didn't you?

A. Well, that part I didn't have nothing to do with. Chin Tai and I fixed up the price for the eggs.

(Testimony of Lee Choy.)

Q. If this Chinaman testified that there were 300 eggs counted by him in that box the next morning, he was mistaken because you and Chin Tai had eaten part of them, hadn't you?

A. Well, that I don't know, whether he counted or not. When I arrived at the store that night I told Chin Tai there were 300 eggs in there.

Q. How were these eggs packed over at Kaneohe?

A. Packed in a box.

Q. Just loose?

A. Loose, I had some rice husks in it.

The COURT.—Rice paddy? A. Rice husks.

[428—348]

Q. What kind of box was this?

A. A square box, China box.

Q. How big is the box?

A. Pretty big size, box is square.

Q. Was it as high as this desk? A. No.

Q. About how high was it, half as high or two-thirds?

A. About this high? (Indicating.)

Q. Who put the rice husks in there?

A. Awai put them in.

Q. Were the husks in that box before you put the eggs in it?

A. Well, he had some of them in a box, put some eggs in covered with husks, then eggs, then husks,

Q. Where did you get this box that you put the chickens in? A. From the store.

(Testimony of Lee Choy.)

Q. Did you ever see that box around there?
What kind of a box was it? A. A long box.

Q. Was it a new box?

A. It was not a new box, an old box.

Q. Had it ever been used to have chickens in it before? A. That I don't know.

Q. Did you nail slats on top of the box?

A. Yes, I did.

Q. So the chickens could get fresh air, is that the reason you did that? [429—349]

A. Well I would not say the chickens get fresh air or not. I only say so the chickens could not get out of the box.

Q. Did you see that other box that Chin Tai's employee has been talking about, that was regularly kept there for the purpose of putting chickens in?

A. No, I did not see that.

Q. Did Chin Tai say anything about putting them in the box? A. No, he did not.

Q. Did he help you to get the box to put the chickens in? A. No.

Q. Did you nail these slats on top of the box?

A. Yes, I did.

Q. Chin Tai was there all the time?

A. He was in his office.

Q. He is pretty well acquainted around that store, isn't he, Chin Tai?

A. Well, he ought to know because that is his own store.

(Testimony of Lee Choy.)

Q. How long has he been doing business in that store, to your knowledge?

A. He bought that store from other people, he was there pretty long.

Q. How many years?

A. I don't know, I didn't put that to memory.

Q. As long as ten years?

A. I don't know how many years. [430—350]

Q. As long as ten years; was it more than ten years or less than ten years, according to your best judgment?

A. I don't know; I don't remember.

Q. Has it been five years?

A. I don't know whether five years or three years.

Q. Has it been as much as three years?

A. I don't know how long he has been in that business, I know that store been there a long time.

Q. Has he been there as much as a month?

A. More than a month.

Q. More than a year?

A. I have been dealing with him over a year, about a year.

Q. Was he in that store before you went to China the last time?

A. That I don't know; I don't remember.

Q. Now you say you drive a truck for Ah Chew Brothers? A. Yes.

Q. And how much do you make a week?

A. Twenty dollars a week.

(Testimony of Lee Choy.)

Q. And how much money do you make on an average every month out of your commission business?

A. Well, sometimes ten, sometimes five dollars, sometimes thirty or forty dollars, sometimes nothing.

Q. How much did you average last year every month, according to your best recollection?

A. I was not working there last year.

Q. When did you start in on this commission business? [431—351]

A. Since I worked to Ah Chew Brothers.

Q. How long has that been?

A. Well, since I have been working there.

Q. When did you start to work for them?

A. I know I am working there 8 or 9 months, I don't know what month I start to work.

Q. About how much have you made during this eight or nine months on your commission business?

A. That I don't know, I didn't keep that in record, sometimes I get more, sometimes I get less.

Q. To the best of your recollection how much every month,—I am not asking you to be definite.

A. Well, sometimes I get thirty, sometimes I get ten, sometimes I get nothing.

The COURT.—What would it average?

The INTERPRETER.—He could not answer that question.

A. I do not keep that in the record, so I could not say how much.

(Testimony of Lee Choy.)

Q. Have you averaged more than a dollar a month during these last seven months?

A. It is more than a dollar a month, but I can't say how much it is.

Q. Has it been less than thirty dollars a month?

A. Yes, sometimes less than thirty, sometimes more than thirty, sometimes forty or fifty; sometimes five dollars.

Q. For the 7 or 8 months has it been less than thirty dollars on an average? [432—352]

A. I could not say because I did not keep that in a record.

Q. Has it been less than a thousand dollars a month during the last six or seven months?

A. I got nothing to show.

Q. You do not know whether it has been less than a thousand dollars a month then, is that right?

A. I could not say because I did not have that in a record.

Q. You could not say whether it has been less than a thousand dollars a month?

A. Well, I could not say because I have nothing in the record to show whether over a thousand dollars or less than a thousand dollars.

Q. You want this jury to believe you do not know whether you made a thousand dollars a month or not out of the commission business during the last seven months, is that correct?

A. It could not go up as far as a thousand dol-

(Testimony of Lee Choy.)

lars a month. As I say, some months fifty and sixty dollars a month, or less.

Q. Would you say you made sixty dollars one month?

A. Sometimes sixty dollars a month, sometimes thirty dollars a month, sometimes nothing.

Q. What month did you make sixty dollars?

A. Well, I don't know, I didn't keep that in the record. I don't know which month.

Q. Did you make sixty dollars one month? [433—353]

Mr. ULRICH.—I think that has gone far enough.

The COURT.—Q. It is not possible for you to say about how much you averaged per month? You are not expected to give the exact figures.

A. I would not say because I was not sure about how much; that is why I did not want to say.

Q. We don't ask you to be sure. About how much, sixty dollars, twenty-five dollars, fifteen dollars, does it average per month?

A. You can count it up. I will tell you about how much a month I make, some months I make more, some months I make less.

The COURT.—Are you able to tell us how much you made during the month of May?

A. No. I could not say how much I make during May, because I did not keep a record of it, sometime I make more, sometimes I make less.

Q. That is so as to each and every month since you have been in that business?

(Testimony of Lee Choy.)

A. I could not tell how much I make a month; I did not keep that in the record.

The COURT.—You say you did not keep a record. How are you able to tell us what you did on some months, that you took in thirty or sixty dollars, if you did not keep a record?

A. I know some months I make that much, but I don't [434—354] know exactly what month.

The COURT.—But you know that you made thirty dollars or fifty dollars, or whatever it might be, for any month. How do you know that if you kept no record? For what reason are you able to remember it?

A. Well, I could not say which month, some month I make some money, sometimes I make more, sometimes less, sometimes sixty, sometimes thirty.

The COURT.—You kept no record of any month?

A. No.

The COURT.—I am inclined to think, Mr. Patterson, that is about all.

Mr. PATTERSON.—Q. How much did you make in the month of October?

Mr. ULRICH.—Objected to—

The COURT.—I will permit that question, being last month. A. I don't remember.

Q. Did you make as much as thirty dollars in the month of October?

A. I make some money. I could not say how much, about how much.

The COURT.—Can you remember how much you

(Testimony of Lee Choy.)

made on that transaction, selling eggs and chickens to Chin Tai, from Kaneohe?

A. I make \$13.60; \$10 eggs, \$3.60 chickens.

Q. Then you paid out six dollars for the automobile, or did you make that over and above?

A. After. I make over six dollars after paying [435—355] the automobile bill, less six dollars automobile, then make over six dollars.

The COURT.—\$13.60, out of which you paid six dollars for the automobile? A. Yes.

Q. Did you have any other commission transaction during the month of October?

A. I don't remember.

Q. Do you remember any of your transactions in September?

Mr. ULRICH.—Objected to—

A. I had transactions with Awai in September.

Q. Now what did you buy that time?

A. Chickens and chicken eggs.

Q. What did you buy that time?

A. I remember on September I bought 250 eggs from him and I did not pay him.

Q. But were any chickens bought this time?

A. Yes.

Q. How many chickens were there?

A. Over ten chickens.

Q. How did you go over after them?

A. Go down on machine?

Q. Won Tim's machine? A. I think it was.

Q. Are you sure it was?

A. Chickens and chicken eggs, are sure.

(Testimony of Lee Choy.)

Q. Was it Won Tim's machine you went over in that time? [436—356] A. I think it was.

Q. Are you positive that it was?

A. I don't quite remember, sometime I go down there, drive my brother's machine, go down there, sometimes I ride Won Tim's machine.

Q. Did you go in the day-time or night-time?

A. I went down there mostly in night-time, because I go down there sometimes day-time, on Sunday.

Q. This time did you go in the day-time or night-time, in September, when you got 250 eggs and ten chickens?

A. Night-time, over ten chickens, not ten chickens,—over ten.

Q. How many over ten? A. Twelve chickens.

Q. What did you say ten for awhile ago?

The INTERPRETER.—He said over ten.

Q. Now you are sure there were exactly 12, are you? A. Yes.

Q. You do not know who drove you over that night?

Mr. ULRICH.—Objected to, if the Court please, this is not along the lines of the direct examination.

The COURT.—I think he might put the question as to whether or not he is not sure. I think the question is substantially correct.

(Question read by the reporter.)

A. I don't remember, sometimes I go down on his machine, sometimes on my machine, sometimes I go down there with any other machine. [437—357]

(Testimony of Lee Choy.)

Q. You testified yesterday that your brother used the automobile during the night-time? A. Yes.

Q. Do you use it sometimes in the night-time yourself, then? A. Yes.

Q. Now this trip we are talking about now, was that the last trip you made to Kaneohe before the night of the 18th of October? A. Yes.

Q. Did you ever do any business with anybody else besides Awai in the commission business?

A. No. Well, I have sometime, but very few.

Q. Who else?

A. Before I had some transactions down Kailua, but now I haven't any.

Q. Who did you have a transaction with down in Kailua?

A. Yes, sometimes when I got time I go around Kailua and sold other things beside that.

Q. Who did you buy eggs and things from in Kailua? A. Rice plantation.

Q. Who owns it?

A. Wing Lee, Wong Kong, Wong Min Chow, Tai Pung.

Q. These men all live at Kailua?

A. All different plantations, rice plantations down Kailua.

Q. Are they down there now? [438—358]

A. Well, I have not been there for a long time.

Q. How long?

A. A long time. I don't remember how long.

Q. A year?

(Testimony of Lee Choy.)

A. I don't remember whether one year or more than one year. I am sure I have been there before.

Q. Are you sure it is more than one year?

A. I don't remember more than one year or less than one year.

Q. You don't remember?

A. I know before I used to go down there every time.

Q. To your best recollection is it less than a year or more than a year ago?

A. Well, I have been there; I haven't been there lately. A few years before I used to go down there every time.

Q. To get eggs and chickens? A. Yes.

Q. To sell on commission? A. Yes.

Q. Are these Chinamen down at Kailua now, that you have given me the names of?

A. I think they are down there, but I am not sure whether they are or not.

Q. You testified a while ago you have only been in this commission business since you have been to work in Ah Chew Brothers. How is it you were buying eggs over a year ago from these men down in Kailua? [439—359]

A. Well, when I working for Ah Chew that is Ah Chew Brothers business, whatever I do outside is my business.

Q. You testified this morning you had been in this commission business since you went to work for Ah Chew Brothers, didn't you?

A. Well, that transaction I had down there was

(Testimony of Lee Choy.)

before that, and stopped about over a year. I did not do that business when I was in the rent service business. After that I went to Ah Chew's place to work, and went in the commission business again.

Q. So that since you went to work for Ah Chew and in the commission business you haven't done any business with these Chinamen? A. No.

Q. How long were you in the rent service business before you went with Ah Chew Brothers?

A. Over a year.

Q. And you did not do any commission business while you were in the rent service business?

A. No.

Q. So then a minute ago you didn't know it was more than a year or less than a year since you seen these Chinamen down there in Kailua. Can you now give us a more definite idea as to when you did business with them?

A. I don't remember. I know it is many years ago, when I was hauling rice down there.

Q. Who were you working for when you were hauling rice [440—360] down there?

A. Ah Chew Brothers rice plantation.

Q. And when was that?

A. Well, that was a long time ago, that is when I first worked there. Now that is the second time, I go back to work for him again.

Q. Before you were a chauffeur did you work for Ah Chew Brothers?

A. Yes, working for Ah Chew Brothers.

Q. Before you became a chauffeur? A. Yes.

(Testimony of Lee Choy.)

Q. What was the nature of your employment at that time? A. Driving automobile truck.

Q. That is when you were hauling rice back and forth from the plantation?

A. Yes, hauling rice from the country down to town, here.

Q. Now, when did you first become impressed with the idea that you were going over to Kaneohe on the night of the 18th?

A. I remember when I was arrested that night.

Q. Did you make up your mind on the afternoon of the 18th to go to Kaneohe that night for eggs?

A. I make up my mind on that day.

Q. What time of the day?

A. Make up my mind to go five o'clock on that day.

Q. You were sure you were going then at 5 o'clock?

A. Yes, I make up my mind 5 o'clock to go down there. [441—361] The boss tell me the steamer arrive that day. I could not go that time because of the steamer would arrive.

Q. Said you could not go at 5 o'clock?

A. That I could not go until I got through with my work.

Q. Who told you that, Lee Chuck?

A. He told me that. Well, I was going to quit at 5 o'clock, he told me not to quit 5 o'clock, he says, because steamer coming in.

Q. Then you would have gone over at 5 o'clock, would you? A. Yes.

(Testimony of Lee Choy.)

Q. Had you made arrangements for an automobile to take you over? A. No.

Q. Had you made any arrangements with Hoon Wai? A. No.

Q. Had not said a word to him? A. No.

Q. You had not mentioned the fact you were going to go over there on that night?

A. I did not.

Q. He did not know whether you were going or not? A. No.

Q. He did not know whether you were going that night or whether you were going to go there a week or two weeks after that, is that correct? [442—362] A. No.

Q. That is the only time you were over to his house in October? A. Yes.

Q. You went over there to get eggs that night?

A. Yes.

Q. Did you go over to get chickens too?

A. I have already stated two or three times I went down to get chickens and chicken eggs.

Q. But Hoon Wai did not know you were coming?

A. I already answered that question. I told you—

Q. I am asking you again.

Mr. ULRICH.—I think he has answered that.

A. I have already answered the question.

The COURT.—When was the last time you had seen him before the 18th?

A. I saw him in the month of September.

(Testimony of Lee Choy.)

The COURT.—The occasion you have already told us about? A. Yes.

The COURT.—And between that time and the 18th you had not seen him? A. No.

Mr. ULRICH.—The objection is renewed.

The COURT.—I think we understand now he had not seen him between whatever the date was, and the 18th of October.

(Argument.)

The COURT.—In pursuance of his answer that he had not seen him since the 18th we can assume Awai did not know [443—363] he was coming down on the 18th.

Q. This night when Lee Chuck told you you couldn't go that night—I withdraw the question. Lee Chuck then told you you could not go at 5 o'clock, there was a steamer coming in from China?

A. Lee Chuck did not tell me that I could not go. I make up my mind to quit 5 o'clock; we did not quit 5 o'clock, and Lee Chuck he told me there was a steamer coming in from China.

Q. When he told you that what did you decide to do?

A. I did not do anything. He instructed all the employees in there we got to work late on account of a steamer coming in.

Q. When he told you this did you still have your mind made up to go to Hoon Wai's place at Kaneohe after you were through work?

A. Well, I did not make up my mind that time, then I go out unexpected.

(Testimony of Lee Choy.)

Q. What do you mean by saying you went out unexpected?

A. Well, I go down there when I feel like it.

Q. And you felt like it this night about 9 o'clock, before you went over to Chin Tai's place?

A. Yes.

Q. Then, as I understand it, there was no particular reason for you to go on this particular night, any other night would have done?

A. Well, sir, I go down there whenever I feel like it, no matter what date. [444—364]

Q. Then you could just as well have gone down on the 17th or 19th?

A. Well, whenever I felt like going I do.

The COURT.—Why not answer the question, you could just as well have gone down on the 17th or 19th? A. I go whenever I like.

Q. And there was no prearranged meeting between you and Hoon Wai that night or any other night? A. No.

The COURT.—Had he gone to bed when you arrived there on the evening of the 18th?

A. No, he came out on the verandah when I arrived there.

Q. Was he already dressed up?

A. Well, he had clothes, pants.

Q. What was this date when you were over in September, if you remember?

A. I don't remember.

Q. You don't know whether it was the 30th of September or first of September?

(Testimony of Lee Choy.)

A. During that month of September I was down there twice.

Q. Well, what date was the last trip down there?

A. I don't remember that date.

Q. Was it as early as the first or as late as the 30th of the month?

A. I did not keep a calendar with me; I could not say what date. [445—365]

The COURT.—On which trip did you get the 250 eggs and 12 chickens, the first trip or the second trip?

A. The last time. I remember that trip, the 250 eggs and 12 chickens because I did not pay him that time.

Q. And about what date, according to your best recollection after all this talk, was it that you made that last trip on which you got the 250 eggs and the 12 chickens?

A. I don't remember because I did not carry the calendar in my pocket. I didn't want to say the date. I am not sure. You might call me a liar.

Q. I am not asking you to be sure, I am not even intimating that you are a liar. I just *what* the date, whatever it was, the 1st, 10th, 20th or 31st, whatever it was?

A. I remember the month was September.

Q. But you would not say whether you made the last trip to Kaneohe on the 1st of September or the 30th of September or any particular dates in between that or on or about any particular date in between that?

(Testimony of Lee Choy.)

A. I would not say what date, because I did not have the calendar in my pocket, with me.

Q. How much did you pay for those 250 eggs?

A. Twenty for one dollar.

Q. How much for the 250? A. \$12.40.

Q. You are sure about the forty cents? [446—366]

Mr. ULRICH.—Objected to. A. \$12.50.

Q. How much did you pay for the chickens?

A. 46 pounds.

Q. And how much did you pay for them a pound?

A. Sixty cents a pound.

Q. How much was that? A. About \$27.60.

Q. Now this night when you went over you paid him fifty dollars, didn't you?

A. Well, I paid him fifty dollars this last trip when I bought the 300 eggs.

Q. How much was your bill the last time?

A. Over forty dollars.

Q. Now I want you to be positive about that?

A. Yes.

Q. How much were the eggs worth, the last batch? 300 eggs, weren't there? A. Yes.

Q. And there were 24 pounds of chicken at sixty cents a pound? A. Yes.

Q. That is \$14.40, isn't it, making \$39.40 altogether. \$39.40 altogether, wasn't it?

A. Whatever you figure it at.

The COURT.—\$15 and \$14.40 is \$29.40.

Q. How much were those last 300 eggs?

(Testimony of Lee Choy.)

A. I told you over ten times that it was 300 eggs, [447—367] fifteen dollars.

Q. \$29.40 altogether? A. Yes.

Q. And you paid Hoon Wai fifty dollars on account on the night of the 18th? A. Yes.

Q. How much was the balance you owed him then? A. Owed him over ten dollars yet.

Q. Do you know exactly how much?

A. You can figure it out.

Q. The only account you had with him then is for the \$40.10 in the first instance, and \$29.40 in the second, \$69.50, is that correct?

A. Altogether these two transactions \$69.50, over the fifty dollars.

Q. So you owe him \$19.50 then? A. Yes.

Q. Did you talk about that that night over there on the 18th?

A. I told him I would give him, when I would give him the fifty dollars and we would fix the different up later on.

Q. Did you mean that you still owed him \$19.50?

A. No, I didn't tell how much, I owed him the balance. I told him I would give him the balance later on.

Q. Did you figure up that night that you owed him \$69.50, while over there at Hoon Wai's place?

A. Yes, I figured it myself. [448—368]

Q. That night over there?

A. That night I know that I owe him some money.

Q. You knew that you owed him \$19.50 after you had paid him the fifty dollars?

(Testimony of Lee Choy.)

A. That night when I was at Hoon Wai's place I know I owed him some money, I did not know exactly how much. When I came back I figured out I owed him \$19.50 more.

Q. Did you figure that out that night?

A. When I was in the police station that night locked up.

Q. Did Hoon Wai tell you how much the chickens were, how much the eggs were, going out that night?

A. No, he did not.

Q. Didn't mention the price at all?

A. No. I know the price, the last time when I was down there.

The COURT.—How was he able to figure out the amount in the police station that night, the exact amount, when he didn't know how much the chickens weighed?

Mr. ULRICH.—They weighed them that night when they got back.

Q. You figured this up down to the police station, now?

A. That night I could not sleep, so I began to figure out the amount.

Q. Now, after the hour of 5 o'clock on the night of the 18th when did the thought first come to your mind again [449—369] to go to Kaneohe that night? A. After 5 o'clock.

Q. After 5 o'clock, when did it first come to your mind again to go to Kaneohe that night?

A. Well, I go that night since I felt like it.

Q. I am asking you, after 5 o'clock when did it

(Testimony of Lee Choy.)

first come to your mind to go to Kaneohe? Did you make up your mind you would go after you got there, after you got back from the boat, or after you went to the boat, or after you got back from the boat the last time?

A. I make up my mind when I quit work that night when I reached home pretty early so I thought we will take a trip down there.

Q. When you say "we" who do you mean?

A. Myself.

Q. When you were at home that night, after your last trip to the boat, you decided you would go down to Kaneohe? A. Yes.

Q. Then at that moment you had a fixed intention in your mind to get an automobile and go to Kaneohe? A. Yes.

Q. And where did you go when this fixed intention got in your mind?

A. I went and walked down to Chin Tai's store.

Q. How far is it from your home to Chin Tai's store? A. Not very far away. [450—370]

Q. How many blocks?

A. I don't know how many blocks. I walked through a little new street down to his place.

Q. How long would it take you to walk down there?

A. I don't know how many minutes to get down to his place, won't take very long.

Q. Does it take one minute or 20 minutes?

A. Well, I didn't hold a watch in my hand, when

(Testimony of Lee Choy.)

I walked down. If I says four or five minutes you might call me a liar.

Q. According to your best recollection it would take about four or five minutes?

A. Maybe more than that, if I looked at the time, if I had the time in my hand.

Q. You didn't see any clock going down that night?

A. Yes, I saw a clock on Kukui Street.

Q. On Kukui Street?

A. A clock in Japanese store on Kukui Street.

Q. What time was it? A. Ten minutes to 9.

Q. You remember that exactly?

A. Yes, I saw the time.

Q. During the day or during the night-time on the 18th of October did you look at the clock at any other time?

A. Why, I see the clock every time but I don't know what is the time. [451—371]

Q. You saw the clock plenty times, but you don't remember any other time of looking at it to see the the particular time?

A. Well, I saw the clock in the morning, eight or nine o'clock, sometime in the afternoon, one o'clock. I always see the clock. Sometimes in that store when I passed.

Q. You don't remember looking at the clock at any particular exact time at any other time on this particular day?

A. I looked at the time for lunch, and our quitting time in the afternoon.

(Testimony of Lee Choy.)

Q. Did you look at it at the house, before you left your house to go to Chin Tai's store that night?

A. No, I did not.

Q. When you left the house to go to Chin Tai's store then you did not know what time it was, did you? A. No.

Q. Did you know about what time it was?

A. I know it was after 8 o'clock.

Q. Did you know it was before 9 o'clock?

A. When I reached on Kukui Street I saw a clock in a Japanese store that was 10 minutes to 9, and I say to myself it is pretty early yet.

Q. But I am asking you about the time you were back in your house before you saw the clock at the Japanese house on Kukui Street. Did you know it was before 9 o'clock then?

A. I would not say. I did not look at the time. [452—372]

Q. You cannot say whether it was 9 o'clock?

A. Or 10 o'clock.

Q. Until you got in the Japanese store?

A. I did not look at the time at my house. I think it is about 8 o'clock. When I reached Kukui Street I saw ten minutes to 9.

Q. And then you went over to Chin Tai's store?

A. Yes.

Q. Is Vineyard Street,—what street is close to where you live on Vineyard Street?

A. Between River and Nuuanu.

Q. And it is anyhow six or seven blocks from your house to Chin Tai's store, isn't it?

(Testimony of Lee Choy.)

A. I didn't count.

Q. Well, you are pretty well acquainted up in that neighborhood, ain't you?

A. I am pretty well acquainted with a lot of other places. I am not a surveyor.

Q. You are not a surveyor? A. No.

Q. You have lived up there, and Ah Chew Brothers is there on Nuuanu Street close to where you live? A. He was on Fort Street.

Q. Do you know those streets in between?

A. Yes, I do.

Q. How many blocks was it, how many blocks is it from your house to Chin Tai's place?

Mr. ULRICH.—We object to that, if the Court please. [453—373] Distances are not capable of being measured by blocks in that neighborhood.

The COURT.—I don't think it could be very intelligible anyway, blocks are so irregular in size.

Q. Tell us how you went to Chin Tai's place. Where did you go from your house. Tell us exactly the road or route from his house to Chin Tai's place. All right, you left your house that night to go to Chin Tai's store?

A. I left my place, came out of Cunha Lane, across Vineyard Street, then in another Cunha Lane, into Kukui Street, then, into Kamanuwai Lane, Beretania Street, across Beretania Street, then straight down to Maunakea Street.

Q. From Beretania Street to Maunakea Street how many blocks is it? When you got to Beretania Street where did you go?

(Testimony of Lee Choy.)

A. Across the street, down to Maunakea Street.

Q. Did you not go along Beretania Street to Maunakea?

A. Beretania Street, across from Kamanuwai Lane, and across Beretania Street, then you get to Maunakea Street, then down to Chin Tai's place.

The COURT.—Can you give us some idea about how long it took you to make that trip, your best judgment, five or ten minutes?

A. I would not say whether five minutes or ten minutes.

The COURT.—What is your best judgment? We would not expect you to be exact. [454—374]

A. About six or seven minutes.

Q. Have you a telephone in your house?

A. Yes, I have.

Q. How much house rent do you pay?

A. Fourteen dollars a month.

Q. Then when you got to Chin Tai's store, what did you do?

A. When I arrived to Chin Tai's store I saw Chin Tai in his office, and I asked Chin Tai if he want some eggs and he says, "Yes." I says, "I am going down to the country now, would you want to come along and take a ride," and he says, "Yes," and then I telephoned to a machine.

Q. How long have you known Chin Tai?

A. Known him for a long time.

Q. Is he a cousin of yours? A. No.

Q. You don't belong to the same Chinese family, or tong, or whatever it is, he belongs to—clan?

(Testimony of Lee Choy.)

A. No.

Q. Did you ever go out riding with Chin Tai before this time? A. Yes, Sometimes.

(Recess from 10:30 A. M. to 10:45 A. M.)

Q. And then you and Chin Tai got in the automobile and went to Kaneohe? A. Yes. [455—375]

Q. The driver stayed out in the car all the time over there?

A. Yes, he was sitting in his machine.

Q. Did Hoon Wai come out to the machine at all?

A. I did tell you he didn't come out.

Q. When did you tell me that?

A. Yesterday, when you questioned me.

Q. Did you—he didn't come out when you were leaving, or didn't come out when you got there?

A. No, he did not.

Q. He didn't talk to the driver at all?

A. Whether he talked to the driver or not I didn't see.

Q. You didn't hear him? A. No, I did not.

Q. You were there all the time, weren't you, with him? A. Yes.

Q. And if he had talked to the driver you were in a position to hear him?

A. He did not talk to him. I didn't hear.

Q. Now, you say it was 6 o'clock that night when you first begin to figure on going down to the boat?

(Testimony of Lee Choy.)

A. Yes, I didn't say 6 o'clock. My boss told me the boat arrived after 6 o'clock.

Q. What did you do between 5 and 6?

A. I was in the back-yard, inside of the warehouse.

Q. Was you working all that time?

A. Working,—sitting down.

Q. From 5 to 6 o'clock you were in the warehouse all the [456—376] time?

A. I was walking in and out.

Q. At 6 o'clock what did you do?

A. I don't know whether it was 6 o'clock or what time it is when my boss told me to bring the machine out and we go down to the wharf.

Q. And up to the time you went down to the wharf you were working, is that correct?

A. Yes, working.

Q. What kind of an automobile did you go down to the wharf in, a Dodge? A. Yes.

Q. And you drove down with him? A. Yes.

Q. And what time did you get down to the wharf? A. After 6 o'clock.

Q. How long after?

A. That I don't know, I didn't have a watch with me.

Q. Was it closer to 6 or closer to 7?

A. It was dark; after 6 o'clock. It was dark that night.

Q. Was it closer to 6 or closer to 7?

A. It was between 6 and 7.

Q. Was it closer to 6 or closer to 7?

(Testimony of Lee Choy.)

A. It was after 6 o'clock. I didn't have no watch. I couldn't say.

Q. According to your best recollection was it closer to 6 or closer to 7 when you went down to the wharf? [457—377] A. After 6 o'clock.

The COURT.—Tell him to answer the question. Is he not able to tell us whether it was closer to 6 or closer to 7?

A. After 6 o'clock. It was dark.

The COURT.—How do you know it was after 6 o'clock?

A. My boss told me it was after 6 o'clock the steamer would arrive.

The COURT.—After 6 it would arrive?

A. Yes.

Q. You don't know what time it was yourself then, do you?

A. Well, I know it was after 6 o'clock; it was dark.

Q. It might have been after 7 too, might it not?

A. The boss told me it was after 6 o'clock the boat would arrive.

Q. But you personally do not know what time it was then? A. I didn't have no watch.

Q. Except what the boss told you? A. Yes.

Q. And how long did you stay down to the boat with the boss this trip? A. Not very long.

The COURT.—What do you mean by "not very long"?

A. I don't think it is half an hour when I left the store by the time I arrived the store. [458—378]

(Testimony of Lee Choy.)

Q. You do not think you were gone half an hour altogether, is that it?

A. Well, maybe half an hour or maybe over half an hour.

Q. But you say you do not think it was half an hour from the time you left the store with the boss until you got back to the store?

A. Well, I think it was about that time. Of course I didn't look at the time. I didn't have no watch with me.

Q. When you got down to the boat there what did you do?

A. I asked those people down there if they want anything.

Q. Did you go in through the hole where they take out the goods?

A. No, went to the dining-room.

Q. How did you get on the boat, did you get in through the hold where they unload and load freight?

A. On top.

Q. Where the first-class passengers come on and off?

A. Yes.

Q. Is that the way you generally go on that boat?

A. Yes.

Q. You deliver vegetables down there sometimes?

A. Every time.

Q. You deliver them up on the first-class passenger's gangway? [459—379]

A. Well, I take it on the boat both ways, sometimes through the gang-plank, sometimes through

(Testimony of Lee Choy.)

the hold. 'Whenever the hold is closed then I go upstairs.

Q. Did you open the hold this night up there?

A. That night I didn't deliver any goods. I don't know.

Q. As a matter of fact, don't these venders and peddlers go down there to the boat, don't they go in and out of the hold? A. No.

Q. They go up the first-class passenger—I will withdraw that. They go right up the same way the passengers come on and off? A. Yes.

Q. When you deliver a sack of potatoes you take them right up the first-class passenger gangway?

A. Sometimes when the hold is closed we take it upon the gangway.

The COURT.—That ought to be sufficient.

Q. This night when you got on the boat you went down below, is that correct?

A. I went downstairs to the dining-room.

Q. And what time did you get back to the store after the first trip?

A. I don't know; I didn't look at the time.

Q. Where did you eat dinner that night?

A. In the store. [460—380]

Q. Who with? A. With the employees.

Q. And what time did you have dinner?

A. We have no particular time, sometime after 4, sometime after 5.

The COURT.—On that particular occasion. Tell us about what time, if you can't give the exact time. A. About 5 o'clock.

(Testimony of Lee Choy.)

Q. You took the boss back to the store about 7 o'clock, didn't you?

A. I don't know whether 7 or after 7, I didn't look at the time.

Q. Was it near 7?

A. As I told you, I didn't have the time; I didn't look at the time.

The COURT.—Do you carry a watch? A. No.

Q. Yesterday when your attorney asked you when you got back you said 7 o'clock. Why is it you was so certain yesterday and not certain today?

A. I says about 7 o'clock, I didn't say exactly the time, I says about 7.

Q. But you can't say now it was about 7, is that right?

A. Well, I stated the same as I testified yesterday, 7 o'clock or after 7, or about 7 o'clock.

Q. All right, let that go. Did your boss go down to the boat on that night again?

A. I don't know whether he went down or not.
[461—381]

Q. You don't know that? A. No.

Q. You didn't see him go down there, did you?

A. No, I did not.

Q. When you got back to the store that night at about 7 o'clock you and the boss separated, didn't you?

A. As soon as I took him home that evening I drove the machine in the yard, in the back, in the yard there, I came in the store and got a half

(Testimony of Lee Choy.)

dozen tins of milk, then I left the store and went home.

Q. Were you through for the day, as far as the boss was concerned, then? A. Yes.

Q. You put away the automobile, didn't you?

A. Yes.

Q. And there was nothing said between you and the boss about going back to the boat that night?

A. No, I got my regular order. I don't have to talk to him again.

Q. Did you tell him you were going down to the boat again that night?

A. I did not. I didn't have to tell him.

Q. Then you went home? A. Yes.

Q. With the six cans of condensed milk?

A. Yes.

Q. How long did you stay home?

A. I took the milk home, and left the milk in the kitchen, then I told my wife we had to go down to the boat again. [462—382]

Q. You told your wife you had to go down to the boat again? A. Yes.

Q. What did you have to go down for?

A. When I was first down to the boat there the man told me he is busy at that time, told me to come back again.

Q. But your boss and you never spoke about that at all?

A. No. Well, the boss he had his own business to attend to, and I attend to my business.

Q. You are working for the boss though?

(Testimony of Lee Choy.)

A. Yes.

Q. You were down there on his business that night, were you not? A. Yes.

Q. Did you inquire of—did you inquire of him whether,—or did he inquire of you whether you had obtained any orders while you were down there talking to the cook?

A. No, he did not ask me if I obtained any orders from there. I came up and told the book-keeper, that is all.

Q. You and he never mentioned that? A. No.

Q. Then you told your wife you had to go down to the boat. You were going down on your company's business, weren't you? A. Yes.

Q. How far do you live from the boss' store? [463—383]

A. The boss' place is on Fort Street, my place on Vineyard and Nuuanu.

Q. Now, is it as far as from here to the Young Hotel? From your place to the boss' place?

A. Well, I could not say. It is not very far. I did not measure the steps.

Q. To your best judgment is it as far to your place, from your place to the boss' store as it is from here to the Young Hotel?

A. His place is three blocks to my place. His place is on Fort Street, on Vineyard Street near River Street, that is my place.

Q. When working for Ah Chew Brothers do you have charge of the automobile when you go out on these trips selling stuff?

(Testimony of Lee Choy.)

A. Whenever I got any goods to deliver I take the truck.

Q. Does anybody else run this truck besides you?

A. Yes, some other working men.

Q. And it never occurred to you to get the automobile to go down on this second trip?

A. The second trip I went down there I went down there on the street-car.

Q. I asked you why didn't you take the boss' car down there on the second trip?

A. I took the street-car, is better. I did not have to take the machine back to the boss' place again.

Q. Was you going to stay all night down on the ship? [464—384]

A. Well, no, as soon as I find out if they want any goods or anything like that I come back.

Q. If you had gone down there and found out that they wanted any goods, then you would have had to come down to the boss' place to get the goods and take them down there on the car, is that right?

A. No, I did not have to deliver on the same night, because the boat leaving the next day, I can deliver that on the next day.

Q. What time did the boat leave on the next day?

A. After 10 o'clock.

Q. When you went down there on this second trip you never had any idea of going to Kaneohe that night at all, did you?

A. Well, I go any time when I feel like it.

(Testimony of Lee Choy.)

The COURT.—Did you get any orders from the boat on this second trip? A. No.

Q. Did you ever get any orders from any boats on the President lines?

A. Sometimes I got orders, sometimes I do not.

Q. How long were you down to the boat this second trip? A. Not very long.

Q. Did you notice whether the *whole* which leads from the boat on to the wharf was open downstairs?

A. No, I did not pass that way. I did not see at all.

Q. You went downstairs, is that correct?

A. Yes. [465—385]

Q. Then you went clear down into the kitchen again?

A. Yes, through the adjoining room and into the kitchen.

Q. The deck on which the kitchen is situated would be about on a level with the wharf, wouldn't it? A. You have to go further down.

Q. To the kitchen? A. Yes.

Q. And you didn't look to see whether that hold was open which goes in just a little above the kitchen at all that night?

A. No, I didn't look, I didn't send any freight in there.

Q. You preferred to go on this first wharf, then by another stairs on to the boat then through the boat into the kitchen? A. Yes.

The COURT.—One point is not very clear to me. Perhaps it is not clear to the jury. Am I correct

(Testimony of Lee Choy.)

in understanding you to say when you went on the boat the first time you saw the cook or whoever it was that had charge of the potatoes, the purchasing of the vegetables, and he told you he didn't have time to attend to the matter at that time and he told you to come back later? A. Yes.

Q. Then when you went back later he sail he did not want anything? [466—386] A. Yes.

Q. Did you know this cook down there?

A. I knew him when I saw him.

Q. And he knew you were down there to sell vegetables and stuff? A. Yes.

Q. Did you talk to anybody besides a cook on that second trip?

A. I talked to several others, and asked them if they wanted to buy anything.

Q. Several other who?

A. Those people that working on the boat.

Q. You were just talking to people who worked on the boat?

A. Those people I asked them if they wanted to buy anything.

Q. How many of them did you ask?

A. Oh, I don't know how many, I didn't count them.

Q. Did you ask a hundred or did you ask two?

A. There is a bunch of them over there. I asked them if they did not want to buy anything. They says, "No."

Q. Where were they, down next to the cook's galley?

(Testimony of Lee Choy.)

A. Right outside the kitchen, inside the chief steward's room, and outside of the chief steward's room.

Q. Is that where you got the opium?

Mr. ULRICH.—Objected to, as the question is an improper one. [467—387]

The COURT.—Objection sustained.

Mr. PATTERSON.—I will withdraw the question.

Q. These were all working men down there that you talked to? A. Yes.

Q. And did you talk to anybody else besides them?

A. Well, when I came upstairs I saw some of the passengers; I talked to them.

Q. What nationality were these passengers?

A. Chinese.

Q. Were the—Did they appear to be Chinese peasants *of* the richer class of Chinese?

A. I am not a guardian for them; I don't know.

Q. Were they well dressed?

A. Common clothes.

Q. Were they up in the first-class passenger's compartments?

A. Well, they were standing on top the deck there. I don't know whether they are first-class passengers or not.

Q. Do you know the difference between the steerage and the first-class passenger department of the boat?

(Testimony of Lee Choy.)

A. Well, I can't tell the difference. They all dress up.

The COURT.—That is not the question. Do you know the difference between the quarters for the first-class passengers and the quarters for the steerage?

A. Yes, I can tell the difference. [468—388]

Q. Were they in the first-class passenger's quarters, the second-class or the steerage?

Mr. ULRICH.—Did you talk to people in these different sections of the boat?

Mr. PATTERSON.—Q. Were they passengers which belonged to those parts of the boat?

Mr. ULRICH.—Objected to.

Q. Were you in that part of the boat? These people that you saw in the part of the boat designed for first-class passengers, are they the ones you tried to sell vegetables to?

A. I could not say whether first-class passengers or second or steerage because they were standing on top.

Q. Where were they, in the first-class passenger space on the boat?

A. They were standing near the gang-plank, gang way.

Q. Do you know whether or not that is a part of the boat which is assigned to the first-class passengers? A. Yes.

Q. And these were the men that you tried to sell the vegetables to?

(Testimony of Lee Choy.)

A. Yes, I asked them if they wanted to buy anything.

Q. And what time of the night was it that you were talking to them?

A. That time I think it was about 7 or 8 o'clock.

Q. It was about 7 or 8?

A. Yes. [469—389]

Q. This was the second trip down there, was it?

A. Yes.

Q. You are not sure whether it was 7 or 8.

A. No.

Q. What time did you get home?

A. When I reached home I don't know what time. I didn't look at the clock.

Q. What is your best recollection on that?

A. I didn't know until I go out.

Q. Do you know now what time you got home from the boat, on the second trip, after looking at the clock in the Japanese store, when it was 10 minutes to 9? A. Yes, I know that.

Q. Well, then, what time was it?

A. After 8 o'clock.

Q. Now, when you and Chin Tai arrived home that night from Kaneohe and after you had eaten the eggs, what did you do?

A. Chin Tai,—I told Chin Tai I am going home.

Q. What did he say?

A. I told him I am going home, he told me, "Wait a minute and we go home together."

Q. Yes. Then what happened?

A. And he rang up for an automobile.

(Testimony of Lee Choy.)

Q. Who rang up?

A. Chin Tai rang for the automobile. He could not get one then he told me to ring up. [470—390]

Q. Who did you ring up?

A. I telephoned to a Japanese automobile.

Q. Who came up there?

A. A Japanese driver.

Q. What is his name?

A. A Japanese by the name of Masu.

Q. How do you spell that? A. M-a-s-u.

Q. Do you know this Japanese?

A. Yes, I know him.

Q. Have you seen him since then? A. Yes.

Q. Talked to him? A. Yes.

Q. Did you talk to him about this case?

A. Yes.

Q. How many times?

A. Twice. The first time I told him to go down to the lawyer's office.

Q. And did he go down? A. Yes, he did.

Q. Have you seen him since then? A. Yes.

Q. And what lawyer did you tell him to go down to see?

A. I told him to go down to Thompson's office.

Q. Were you there when he was there? [471—391] A. Yes, I was.

Q. Did you know him before this night?

A. Yes, I did.

Q. How long have you known him?

A. A long time.

(Testimony of Lee Choy.)

Q. Well, how long? A. Several months.

Q. What stand is he on? A. Vineyard Street.

Q. Close to your place? A. Close to my place.

Q. Is Kamihara on that stand?

A. I don't know this Kamihara; I don't know what stand he belongs.

Q. You know he is not on the same stand with Masu, do you?

A. That I don't know, whether he belongs to the same auto stand with him or not.

Q. Does Masu drive you often? A. Yes.

Q. How many times has he driven you this month? A. Several times.

Q. As many as ten times?

A. I don't know how many times, sometimes when I want to go home I call from in town.

Q. Is it less than ten times or more than ten times, according to the best of your recollection?

The COURT.—This month? [472—392]

Q. This month, yes? A. Eight or ten times.

Q. That is during the month of November?

A. Yes.

Q. Did he drive you in the month of October?

A. Yes.

Q. Several times? A. Yes.

Q. Every month he drives you several times, is that right? A. Yes.

Q. How about Won Tim, does he drive you quite a bit too? A. Yes.

Q. Several times during each month?

A. Yes.

(Testimony of Lee Choy.)

Q. Have you got any other drivers besides Masu and Won Tim?

Mr. ULRICH.—Objected to, if the Court please.

The COURT.—Objection overruled.

(Exception.)

A. Plenty of them.

Q. You have quite a bit of use for automobiles then, have you? A. Yes.

Q. Use one almost every day, I guess?

A. Yes, use every day.

Q. How many times a day do you use an automobile? A. I could not say, sir. [473—393]

The COURT.—The question covers hired automobiles.

Q. How many times do you employ an automobile, every day, once or twice?

A. Sometimes once a day, sometimes I do not use.

Q. Sometimes more than once a day, is that correct? A. Yes.

Q. You have four children and a wife to support, haven't you? A. Yes.

Q. Have to buy clothes for them? A. Yes.

Q. You have no source of income except from your commission business and your employment as truck driver for Ah Chew Brothers?

A. Yes, sir, that is all.

Q. Now, let us go back to Masu. You called him up then? A. Yes.

Q. And he came up to your place, did he?

A. When was that?

Q. On the night of the 18th?

(Testimony of Lee Choy.)

A. I told him to come down Manuakea and Hotel Street, the corner.

Q. Did he come? A. Yes, he did.

Q. Was Chin Tai in the store with you that night? A. Yes.

Q. And you both got in the automobile?

A. Yes. [474—394]

Q. And where did you go?

A. My intention was to go home.

Q. And what happened?

A. Chin Tai told me to take a ride before we go home.

Q. Did you take a ride? A. Yes, we did.

Q. And where did you go to?

A. Along Hotel Street, down this road, waterfront, up Fort Street.

Q. Down Hotel Street, is that correct?

A. Yes.

Q. Down which road?

A. Turn down to Richard Street.

Q. Which is Richard Street?

A. This street here. (Indicating.)

Q. On the other side of this building?

A. Yes.

Q. Why did you go down Richard Street?

A. Well, unexpected, Chin Tai says we will drive down this way.

Q. Did he say anything before that? A. No.

Q. You are positive of that? A. I am.

Q. Yesterday you testified that he said, "This is a good road down this way"?

(Testimony of Lee Choy.)

A. Well, that is what he says, it is a good road.

Q. You said a moment ago you were positive that he [475—395] said nothing but, “Drive down this way”?

A. Chin Tai told me, “Go down this way.” I told the driver to drive down this way.

Q. Chin Tai can talk, can’t he?

A. He can’t speak very much.

Q. Did he say this is a good road down this way, or did he not? A. I think he did.

Q. You don’t remember, you are not sure about that, are you? A. No.

Q. Then you went down Richard Street how far, go right down the waterfront and then up?

A. Fort Street.

Q. Did you see pier 7 down there that night?

A. Yes.

Q. Where is pier 7 with reference to the foot of Richard Street?

A. Past Richard Street, right below the Hawaiian Ice Works.

Q. You were going right straight down Richard Street, and when you got to the Ala Moana Road is it to the left or to the right?

A. Turned over to Fort Street and back.

Q. Did you see Kamihara’s car down there that night? A. I don’t know his car.

Q. And when you got down to Richard Street then you [476—396] turned to the right up as far as Merchant and Richards Street,—you turned to the right up as far as Fort Street, is that right?

(Testimony of Lee Choy.)

A. Yes, we were driving right straight along, turned up Fort Street.

Q. When you go to Fort and Merchant Street that is when Chin Tai hollered out, "Hello, McDuffie" or something like that? A. Yes.

Q. This happened right at the intersection of Fort and Merchant Street, didn't it?

A. Not intersection, right by the bank.

Q. Right by the bank? Was it on the mauka or makai side of Merchant Street?

A. Below Merchant Street on Fort Street, I stopped.

Q. On the makai side then? A. Yes.

Q. Was there quite a bit of talking going on there? A. I don't know; I didn't talk.

Q. They got you out of the automobile, didn't they? A. Yes.

Q. They didn't say a word to you, did they?

A. Billy Wells said, "This is the Chinaman" and then they took me out of the machine.

Q. Where did they take you?

A. Took me to the Japanese machine, they took me to the Japanese automobile, right alongside of the Japanese [477—397] driver, and some of the officers flashed a light on my face, and they asked the Japanese, "Is this the man" and the Japanese says, "No savee."

Q. The Japanese says what?

A. "No savee," I don't know.

Q. That is what he said, his exact words?

(Testimony of Lee Choy.)

A. Yes.

The COURT.—You mean the Japanese sitting over there? A. Yes.

Q. Kamihara? A. Yes.

Q. What did the woman say?

A. Then they called the woman to identify me, but what the woman says I don't know.

Q. You could not understand?

A. I did not hear her say anything.

The COURT.—She said something, did she?

A. I did not hear.

Q. You did not hear her say anything?

A. I did not hear her say anything.

Q. Did you hear Wells ask if you worked for Ah Chew Brothers, he asked you if you worked for Ah Chew Brothers, didn't he?

A. Yes, he did.

Q. That was before you got over to the woman and the Japanese? A. No.

Q. When was that he asked you that?

A. When I got off the machine he asked me.
[478—398]

Q. Before you got over to where the woman and the Japanese was? A. Yes, before that.

Q. Did you and Chin Tai go near the police station that night before you were arrested?

A. No.

Q. Didn't you and Chin Tai and this Japanese, on his machine, go down to the police station?

A. No.

(Testimony of Lee Choy.)

Q. You don't remember Chin Tai getting off the machine that night?

A. We got off and talked to McDuffie.

Q. Before you saw McDuffie that night, before you were arrested down on Merchant Street, didn't Chin Tai get off that machine in front of the police station? A. No.

Q. You are positive of that, ain't you?

A. Yes, I am positive.

Q. If you had—if he had done that you would have seen him, wouldn't you? A. Yes.

Q. Didn't you drive around the town with this man Masu that night in that machine?

A. No. You can call Masu over here.

Q. You didn't drive around with him?

A. Well, only that night down Hotel Street and Richard Street, the waterfront, down to Merchant Street.

Q. You did not take any other trip? [479—399]

A. No.

Q. Didn't you make a statement at one time you went out, at one time, you went out and saw lights in Chin Tai's house and woke him up to take a ride?

The COURT.—If counsel insists on it you ought to fix the time and place and so on.

A. No.

Q. And you didn't say anything to this woman when you got in the automobile that night?

A. No, I didn't know her.

(Testimony of Lee Choy.)

Q. You didn't have any conversation with Hara down there in the police station the next morning?

A. No, we was separated in the police station, in the jail yard down to the police station.

Q. You didn't get in Hara's machine with that woman down there on the night of the 18th at the wharf?

A. No.

Q. You were not out to Mrs. Tom Leong's place?

A. No.

Q. You did not have anything to do with this opium that was introduced in evidence here?

A. No, I didn't have anything to do with that. I don't know.

Q. If you had seen one of those cans you would not have known what it was that night?

A. The first time I ever seen them.

Q. Did you see anybody that you knew down there at the wharf that night? [480—400]

A. I know everybody down there.

Q. Everybody you knew?

A. Everybody I know them when I see them.

Q. Did you see Wells down there?

A. When I went down to the wharf that night he was standing by the step.

Q. Did you see Stevenson?

A. Yes, I saw him.

Q. Did you know these two men?

A. Yes, know them.

Q. How long have you known Stevenson?

A. I know him not very good.

Q. Where did you get acquainted with him?

(Testimony of Lee Choy.)

A. I know him but we don't talk to each other.

Q. Where did you see him, where did you ever see him before this night down there?

A. Sometime I saw him on the street, sometime I saw him down on the wharf, most of the time I saw him down on the wharf.

Q. How long ago was it you first saw Stevenson?

A. A long time ago.

Q. A year or two or how long?

A. I don't know, several months.

Q. When you were a chauffeur, is that the first time you saw him?

A. No, that time I don't know him.

Q. Where did you come in contact with him?
[481—401]

A. Most every time I see him standing down by the step, down by the wharf.

Q. Whenever these steamers would come in?

A. Yes.

Q. Did you know what his business was?

A. Yes, I know.

Q. Did you know what Wells' business was?

A. Yes, I know.

Q. What is their business? A. Detective.

Q. For what particular branch, if you know?

A. United States.

Q. You know they are members of the opium squad, don't you? A. Yes.

Q. And you have known that a long time, haven't you? A. Yes.

Q. Where did you find that out?

(Testimony of Lee Choy.)

Mr. ULRICH.—Objected to, what difference does it make. I object to it as immaterial.

The COURT.—Objection overruled.

A. I heard somebody tell me a long time ago.

Q. Did you and Chin Tai ever take a ride at night before this time? A. Yes, once in a while.

Q. Well, how often?

A. All depends, sometimes once in three weeks, sometimes— [482—402]

Q. Well, how often?

A. All depends, sometimes once in three weeks; sometimes once in one year, sometimes once in six months.

(Witness excused.)

**Testimony of Yasuhei Kamihara, for Defendant
(Recalled).**

YASUHEI KAMIHARA, recalled as a witness for the defendant, having been heretofore duly sworn, testified as follows:

Direct Examination.

(By Mr. ULRICH.)

Q. Mr. Kamihara, you were arrested last night and five or six tins of opium were found on your person, isn't that a fact?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial, not within the issues of this case.

Mr. ULRICH.—I will give more of the circumstances of the arrest.

(Testimony of Yasuhei Kamihara.)

The COURT.—Put your question.

Q. You were arrested last night, taken into custody, and five or six tins of opium similar to the tins of opium which have been introduced in evidence were found on your person by Mr. Allen of the narcotic squad, isn't that a fact?

A. I don't know anything about it. I was not. I did not see that.

Q. Last night, together with Matsuda, a man who, is in this case, and Ogata?

A. No. Have you got any evidence to that? You must not [483—403] say that.

Cross-examination.

(By Mr. PATTERSON.)

Q. Where were you last night?

A. I came to my stand last evening about 7:30, and I sat on a chair in the back part of the stand watching the boys playing cards.

Q. Were you arrested last night?

A. No, they didn't have me arrested.

Q. Was there any police officers got after you last night? A. No, nobody came in.

Mr. ULRICH.—Information has come to that effect directly to me. I want to have an opportunity to call certain witnesses.

(Witness excused.)

The COURT.—I don't know what it has to do with this case.

Mr. ULRICH.—That opium, we propose to show, is opium similar to this opium, and is found in the

possession of this witness. If we can show this man has opium in his possession, to show that he is himself an opium smuggler instead of Lee Choy,—we have here a man who is in the business of smuggling possibly himself. Furthermore we find opium in the possession of this man, and can trace it down.

Mr. PATTERSON.—As far as I am concerned counsel can have [484—404] a continuation of this case until next year, if he wants to show this man has ever had any opium found on him.

Mr. ULRICH.—If we cannot support it by the evidence, that is a fact counsel can take his own advantage of. I have a right to go into that. The Court should I believe allow the jury to investigate that fact. If opium was found in this man's possession it is something that this jury should know.

The COURT.—We don't want to have to rule on a case out of time. We want to dispose of the case now before the Court.

Mr. PATTERSON.—If this man was found with these tins of opium,—he is counsel's own witness. I have not produced this man.

Mr. ULRICH.—I have produced this man for the purpose of showing a certain fact. He has not shown that fact. I am offering to prove that fact by other witnesses. Perhaps we cannot make good on that offer. It is most material, however, that may be presented to the jury. We have been trying to find out what has become of this opium.

This jury is interested in knowing the facts, and if it is a fact it can be used in evidence. I am not bound merely by his statement that he did not do it, or that he is not doing it or that he was not arrested. I am telling the Court that in perfect good faith. I have information which forces me, makes [485—405] me feel at liberty, to prove those facts.

The COURT.—You contend that the opium which Kawahara had is part of that first lot?

Mr. ULRICH.—Evidence which will make it a very probable fact.

The COURT.—You say that is your purpose?

Mr. ULRICH.—Yes, it is certainly reasonable. I ask for a continuance for the purpose of being allowed to produce further testimony before I rest, unless counsel wants to proceed with rebuttal, with the privilege of my putting this on later.

The COURT.—Understand, I am not holding that it is proper. I am willing to be shown.

With the understanding that he has a right to produce any such evidence that he may produce it later, even though the rebuttal is on or being put on. With that understanding I will let the rebuttal go in. I am not holding you have that right, but the opportunity of offering the evidence will be afforded and the Court will determine whether it is proper.

Mr. ULRICH.—We rest, with that privilege.

The COURT.—The Court holding in abeyance whatever ruling may be proper at that time, until

he is satisfied it is proper to offer such evidence, you may have an opportunity to investigate it and see whether he has or not. I don't see how that would interfere with your rebuttal, Mr. Patterson. [486—406]

Mr. PATTERSON.—The prosecution could go on with the rebuttal to-morrow.

The COURT.—I am holding that Mr. Ulrich has a right to offer any such evidence so that he may have an opportunity to investigate the matter. That part will remain open until to-morrow morning. If there is no more at that time we will proceed with your rebuttal, is that satisfactory?

Mr. ULRICH.—Yes.

Mr. PATTERSON.—Yes.

The COURT.—(To the jury.) Let no one approach you. If anyone should approach you on this case you report the matter to the Court. You will be excused until 9 o'clock to-morrow morning, to which time this cause stands continued.

(Continued to 9 o'clock A. M. Friday, November 17, 1922.) [487—407]

In the District Court of the United States in and
for the Territory of Hawaii.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

(Testimony of Yasuhei Kamihara.)

On Friday, November 17, 1922, at 9 o'clock A. M., all parties being present as before, the following further proceedings were had and testimony taken:

(Jury all present.)

YASUHEI KAMIHARA, recalled to the stand for further examination, testified as follows:

Redirect Examination.

(By Mr. ULRICH.)

Q. Your auto stand is known as the Paradise Auto Stand on Vineyard Street, is that right?

A. Yes.

Q. Isn't it a fact that about a dozen tins of opium were taken from that stand the night before last?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

(Argument.)

The COURT.—We do not want to get outside of the facts.

(Argument.) [488—408]

The COURT.—Unless you claim he is the owner of that stand or is in charge of it. The objection is sustained. We will not go into that.

Mr. ULRICH.—We note an exception.

Mr. PATTERSON.—I wish to make a motion at this time. I move that your Honor instruct the jury to totally disregard this whole subject, this whole speech Mr. Ulrich has made just now, in regard to opium being found at the auto stand.

(Testimony of Yasuhei Kamihara.)

The COURT.—You will consider only the evidence, gentlemen of the jury. You are all intelligent men, and I have no doubt will understand you are to consider only the evidence. Proceed, Mr. Ulrich.

Q. You said yesterday that while you were at this stand you were watching the boys playing cards and no officers came there and no arrests were made. Do you still say that that is true?

Mr. PATTERSON.—I object to the question on the ground that it is incompetent, irrelevant and immaterial, and that counsel is trying to impeach his own witness. May it please your Honor he is examining him on a matter that is incompetent, irrelevant and immaterial for any purpose in this case, a collateral matter, and something that took place or is alleged to have taken place since the arrest. There will be no end to this trial if we are going to try another case.

The COURT.—The question was asked and answered [489—409] before. Objection sustained.

Mr. ULRICH.—Exception to the Court's ruling.

Q. You said yesterday you were not arrested the night before last and taken to the police station together with Matsuda and Ogata in an opium raid which was made on your stand,—

Mr. PATTERSON.—He has said nothing about an opium raid on his stand.

Q. I will put this question to you. Isn't it a fact that you went with certain detectives and officers from your stand to the police station to—

(Testimony of Yasuhei Kamihara.)

gether with about 12 tins of opium that had been taken at that stand at that ime?

A. No, I did no go there; there was no reason for me to be taken there.

Mr. PATTERSON.—I have objected to this question two or three times.

The COURT.—The jury have been instructed.

Mr. PATTERSON.—Counsel is arguing to the jury, and commenting upon evidence that is not admissible.

Q. Aside from yourself at that auto stand there was or were before this raid ever took place, also at that stand a Japanese driver named Matsuda and another Japanese driver named Okida?

Mr. PATTERSON.—Objected to, if your Honor please.

The COURT.—How does that involve this defendant? Objection sustained. Let us not go off on immaterial matters.

Mr. ULRICH.—Does the Court rule it is immaterial that [490—410] opium has been found in this stand?

(Argument.)

The COURT.—There is no occasion for argument, Mr. Patterson. I ruled in your favor. Exception allowed.

Mr. ULRICH.—The Court rules I cannot even find out who the drivers at his stand are?

The COURT.—I understand it to be along this same line, in regard to opium. He has already

(Testimony of William D. Allen.)

said he had nothing to do with opium, he did not have opium. I have very grave doubts even though he had admitted he had opium whether that would be pertinent in this case.

Mr. ULRICH.—If the Court makes that ruling I cant' pursue it further.

The COURT.—I think it is improper in view of the preceding questions.

(Witness excused.)

Testimony of William D. Allen, for Defendant.

WILLIAM D. ALLEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ULRICH.)

Q. What is your name? A. William D. Allen.

Q. You are one of the narcotic officers here in Honolulu, [491—411] are you? A. Yes, sir.

Q. Mr. Allen, on the night before last did you make a raid on or visit to a certain auto stand in Vineyard Street, known as the Paradise Auto Stand? A. Yes, I did.

Q. Did you find opium there?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I will permit the question. It is preliminary. Objection overruled. I may find it proper.

A. We found some tins there we suspected con-

(Testimony of William D. Allen.)

tained opium. Analysis has not been made of them yet.

Q. You found some tins which you suspect contain opium? A. That is correct.

Q. Where are those tins?

A. They are in my possession sealed up.

Q. Downstairs? A. Yes, sir.

Q. Can you bring them here please?

A. I don't know whether I have the power to do it.

Mr. ULRICH.—I will ask that he be directed to bring one of those tins here.

Mr. PATTERSON.—Objected to.

The COURT.—It has not been determined whether it is opium. [492—412]

(Argument.)

The COURT.—I will determine before the witness leaves the stand,—that will be in pursuance to any further questions you bring out.

Q. Did you make certain arrests there that night?

A. We did.

Q. And you took certain Japanese to the police station did you not? A. Two.

Q. You are very sure you only took two to the police station? A. We only arrested two men.

Q. How many men did you take to the police station? A. I didn't take any.

Q. I am not asking you how many you arrested. I am asking you how many went to the police station.

A. Only two left with me to go to the police

(Testimony of William D. Allen.)

station. Those were the only men we had in custody, and I directed one of the men to take them over to the jail. Only two at that time.

Q. I am asking you how many, if you know, went to the police station, of the drivers from that stand?

A. There were only two men that got in the automobile, except my men.

Q. In what automobile.

A. In the automobile,—talking about taking these two men down to the station. [493—413]

Q. Was there any other automobile going to the police station? A. No.

Q. Who else was with you on that raid?

A. Mr. Wells and Mr. Stevenson.

Q. Anyone else? A. That is all.

Q. Was Suzuki of your office there?

A. We haven't anybody by that name employed by us.

Q. You have no one by that name, no man who works for you there regularly or indirectly?

A. He does not work for us at all.

Q. You know him? A. I know him; yes, sir.

Q. Don't you know that he has been down there in your office working with you from time to time?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I will permit the question.

A. He comes in our office a number of times, the same as other persons. Not on our pay-rolls at all.

Q. He was not with you in this raid?

A. In the vicinity there.

(Testimony of William D. Allen.)

Q. Not with you? A. No.

Q. I will show you this tin of opium, and I will ask you if that is what you took from the stand, that kind of a tin? [494—414]

A. No, sir; the tins are similar except in size, the labels are far different from these labels, the labels are white, the other tins haven't any labels at all, some of them.

Q. Do you see this Japanese sitting here with this lady? A. Yes.

Q. Have you ever seen him before?

A. I have seen him around the court.

Q. Are you willing to swear on your oath that he wasn't on that stand there that night?

A. I cannot identify if he was there. There was one up there about 20 years old, another Japanese there about 30 or 35 was in there, I can't say as to who he was; if that was the one that was him, otherwise I can't identify him.

Q. You can identify the other two?

A. Only one. There was a young boy about 20 years old, and a Japanese that was older. If he was there I can't identify the way he was dressed, at the present time, because I did not pay any attention to him.

Q. Now, where did you get this opium?

A. From an automobile, Number 4066.

Q. All of it? A. The 12 tins.

Q. All 12 tins? A. All out of the one car.
[495—415]

(Testimony of William D. Allen.)

Q. What car?

A. Number 4066. Belongs to a fellow by the name of Matasuda.

Q. How many other automobiles did you see at that stand?

A. I believe three or four all told. We took two.

Q. And you say on your oath that only two of those Japanese from that stand went to the police station that night? A. Absolutely.

Mr. ULRICH.—I want the tins.

The COURT.—All right, bring them all up.

Mr. ULRICH.—S. Suzuki has not appeared.

The COURT.—Issue a bench-warrant returnable forthwith.

(Witness excused.)

Testimony of William Wells, for Defendant (Recalled).

WILLIAM WELLS, having heretofore been sworn, was recalled for further examination and testified as follows:

Direct Examination.

(By Mr. ULRICH.)

Q. Mr. Wells, you were a member of the party that made this raid and got this opium on Vineyard Street the night before last? A. Yes, sir.

Q. You know Matsuda, don't you?

A. Matsuda?

Q. I don't mean Matsuda, I mean Kamihara?

A. Yes, sir. [496—416]

(Testimony of William Wells.)

Q. I am going to ask you on your oath now, Mr. Wells—

The COURT.—He is under oath.

Q. Whether or not you saw Kamihara on that stand that night? A. Kamihara?

Q. Yes, Kamihara? A. Yes, sir.

Q. I am going to ask you Mr. Wells whether or not Kamihara went to the police station with them, with your party when you took the other Japanese down? A. I did not.

Q. I am going to ask you whether he went to the police station at all, went with the rest of the party, or alone? A. No, sir.

Q. You mean he didn't go in your automobile, or he did not go in any other car in that party?

A. From the stand we came down here, and from here I went home. Mr. Stevenson and Allen took the two Japanese to the police station.

Q. This opium was found all in one automobile?

A. 4066.

Q. You took two men down, didn't you?

A. Yes, sir.

Q. One who was the driver of that car?

A. Yes, sir.

Q. And the other who was one of the other drivers on the stand? [497—417]

A. Yes.

Q. Why didn't you take Kamihara also, he was another driver right there?

Mr. PATTERSON.—Objected to as incompetent,

(Testimony of William Wells.)

irrelevant and immaterial, and calling for a conclusion and opinion of the witness.

The COURT.—I am very doubtful about the admissibility of that. I will permit the question. Objection overruled.

A. We had information that Ogawa had the opium.

Q. That was one of the other two that were arrested? A. Yes, sir.

Q. And you took in only him and Matsuda. Now, why didn't you take Kamihara?

Mr. PATTERSON.—I object.

(Argument.)

The COURT.—You have ample time and opportunity to make all the comments you may desire to make later on. I think he has answered your question.

Mr. ULRICH.—He said he had information.

A. Because we had information that Ogawa had the opium.

Q. No information against Kamihara? Why did you take Matsuda?

A. Found opium on his car.

Q. And you had information that Ogawa had something to do with it? A. Yes. [498—418]

Q. Aren't both Ozawa and Matsuda in custody now to the best of your knowledge and belief?

A. Yes.

Mr. PATTERSON.—I think we are getting into an issue that has nothing to do with this case.

(Testimony of William Wells.)

The COURT.—I am very strongly inclined to the opinion that this procedure is very irregular.

Cross-examination.

(By Mr. PATTERSON.)

Q. Mr. Wells, if Mr. Kamihara, the witness for the Government in this case had had opium in his car would you have arrested him? A. Yes.

Q. If you had heard he was dealing in opium would you have arrested him? A. Yes.

Q. The fact you did not arrest him was because you had nothing on him, is that correct?

A. Yes, sir.

Redirect Examination.

(By Mr. ULRICH.)

Q. Following up, you say that you had no information about Kamihara? A. No, sir.

Q. You did not consider the fact that he was right there at the same stand, and mixed up with another opium case, sufficient reason to take him down along, did you? [499—419]

Mr. PATTERSON.—Objected to.

The COURT.—Objection overruled.

Q. I am asking you,—you say you had something on these other two men and you found opium in an automobile there, and in the same stand with the automobile that Kamihara had? A. Yes, sir.

Q. You found Kamihara there? A. Yes, sir.

Q. You knew that Kamihara had been implicated in this other opium transaction to the extent that he had been the driver that carried the opium away from the boat in an automobile? A. Yes.

(Testimony of William Wells.)

Q. Didn't you consider those facts sufficient reason for taking him down and at least giving him some kind of an examination?

Mr. PATTERSON.—Objected to.

The COURT.—Objection overruled.

A. No.

Q. Did you have any talk with Kamihara when you were down there that night? A. No, sir.

Q. Who gave you the information that Ozawa was the man and not Kamihara?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained. [500—420]

Mr. ULRICH.—Exception.

(Witness excused.)

**Testimony of W. T. Stevenson, for Defendant
(Recalled).**

W. T. STEVENSON, recalled as a witness for the defendant, having heretofore been sworn, testified as follows:

Direct Examination.

(By Mr. ULRICH.)

Q. Were you on this opium raid that took place over on Vineyard the night before last?

A. I was.

Q. You know Kamihara here? A. I do.

Q. Did you see him there? A. I did.

Q. From what car did you take that opium?

A. Car 4066.

Q. Who told you who that car belonged to?

(Testimony of W. T. Stevenson.)

A. We had been working on the case for about a week or ten days.

Q. Where did you get your information as to whose car that was?

Mr. PATTERSON.—Objected to.

The COURT.—Objection sustained.

Q. Will you say that Kamihara didn't go down to the police station?

A. I will. He didn't go with us, but I didn't go to the police office at all. We didn't lock the men up at [501—421] the police station.

Q. He didn't come with you?

A. No, he didn't.

(Witness excused.)

**Testimony of William D. Allen, Jr., for Defendant
(Recalled).**

WILLIAM D. ALLEN, Jr., recalled as a witness for the defendant, having heretofore been duly sworn, testified as follows:

Direct Examination (Continued).

(By Mr. ULRICH.)

(Witness produces tins.)

Q. Are these just the way they were taken from the automobile?

A. Just the way they were taken from the machine.

Q. Haven't you any with wrappers?

A. Some that I have here are the same, with white wrappers.

(Testimony of William D. Allen, Jr.)

Q. That one is white. (Indicating.) You don't know whether it is opium or not?

A. I know one of them is molasses, I am positive that one of them is molasses. This is molasses. (Indicating.)

Q. You haven't made a sufficient test? Have you opened any? A. Just as I show you, four.

Q. Are those all molasses?

A. I could not say. I don't think it is pure opium.

Q. You think it has been diluted?

A. It don't seem to be smoking opium; maybe some [502—422] other composition in there. I don't know.

Q. You don't know what is contained except in this one?

Mr. PATTERSON.—Objected to. Mr. Allen has not been qualified as an expert in regard to opium.

The COURT.—He has already stated that he doesn't know.

A. I cannot say, the only one I tested was molasses.

(Witness excused.) [503—423]

REBUTTAL.

**Testimony of En You Kan, for the Government
(In Rebuttal).**

EN YOU KAN, was called and duly sworn as a witness for the Government in rebuttal, and testified as follows:

Direct Examination.

(By Mr. PATTERSON.)

Q. What is your name? A. En You Kan.

Q. What is your business? A. Police officer.

Q. City and county of Honolulu? A. Yes.

Q. Were you such on the 18th day of October, 1922? You were a police officer on the 18th day of October, 1922? A. Yes.

Q. Do you know Chin Tai? A. I know him.

Q. Do you know this woman here?

A. Yes, I do.

Q. You have seen her before?

A. Just that night.

Q. Did you see Ching Tai that night?

A. I have.

Q. Were you on duty that night?

A. I was on duty.

Q. What was your particular duty?

A. Why I was,—I am a sergeant.

Q. What was your duty that night?

A. Why my duty was up at the station.

Q. Did you see Ching Tai that night? [504—424]

A. I have.

Q. About what time?

(Testimony of En You Kan.)

A. Why I could not state what particular time.

Q. What time did you go on duty?

A. I went on at 10:40, and I usually get through writing along about usually 11:20. I was through writing when he came.

Q. How did he come?

A. He came on an automobile.

Q. What did he do?

A. He jumped off the automobile and approached me, and asked me where Mr. McDuffie was.

Q. What did you tell him?

A. I told him Mr. McDuffie has gone home, he leaves at 11 o'clock.

Q. It was after 11 then?

A. It must be after 11 o'clock.

Q. You don't know exactly what time it was?

A. No.

Q. You remember him coming there and asking for McDuffie? A. Yes.

Q. What did he do then?

A. He got on an automobile and drove away.

Q. Where were you standing at that time?

A. I was standing in front of the station.

Q. Did you see him again that night?

A. Later on, yes. [505—425]

Q. How much later?

A. Why, it was about 1 o'clock.

Q. Was that the time the woman and Lee Choy were booked? You know the defendant here, Lee Choy, don't you? A. Yes, I did.

(Testimony of En You Kan.)

Q. And were they booked at the time you saw him the second time?

A. They were about to be booked, I think, when I saw him the second time.

Q. He was with them at that time?

A. Yes, sir.

Cross-examination.

(By Mr. ULRICH.)

Q. Mr. Kan, you have seen Chin Tai down there at the police station a good many times, haven't you? A. You mean other times?

Q. Yes. A. Yes, I have.

Q. He comes in quite frequently, doesn't he?

A. Yes.

Q. Now I want you to think very carefully and say if you can whether or not you might not be mistaken about his having been there that particular night twice, instead of some other particular night. Are you absolutely positive?

A. I am positive that he been there twice that night.

Q. You say you went on duty there at what time? [506—426] A. At 10:40.

Q. And then you had some writing?

A. Yes, sir.

Q. And you had finished your writing when you saw him, is that right? A. Yes.

Q. Now you didn't look at the clock when you saw him did you? You were not inside? You were outside, standing out in the doorway there some place? A. In the doorway.

(Testimony of En You Kan.)

Q. You didn't look at the clock just before he left or before he came? A. No.

Q. Did you make any note of the time? When you say it was 11:20 you fix that as the time when you usually finish your writing? A. Yes.

Q. And you finished your writing? A. I had.

Q. It was then sometime after 11:20. Now you don't know just how long it was after that, do you?

A. I do not.

Q. You have no very definite idea as to just whether it was before 12 or after 12, have you?

A. I have not any idea.

Q. All that you know is that it was after you had finished your writing you were standing outside there? [507—427] A. Yes.

Q. It may have been somewhat later? A. Yes.

Q. How was Chin Tai dressed when you saw him there at that time?

A. Well, I could not just say, but he never dressed any out of the ordinary.

Q. You don't remember anything in particular about his dress? A. No.

Q. Do you know Yee Yap? A. I know Yee Yap.

Q. Are you sure it was not Yee Yap? You don't know anything that recalls his appearance of him that goes through your mind now? A. I do not.

Q. Can you remember anybody else that called there that night before these people were arrested?

A. Why there was a witness up here, William Hart, another police officer.

Q. Any other civilians, any person from the out-

(Testimony of En You Kan.)

side, who were in there? A. I don't remember.

Q. You cannot remember. Were there other people who called?

A. Only when the party was brought in.

Q. Aside from that party, the people who called at your station there before one o'clock, can you recall [508—428] any other single person who came there? A. No.

Q. There were other people who came there, weren't there?

A. There might have been, but I don't remember any of them.

Q. Chin Tai, he is the only one that stands out in your memory? A. Yes, sir.

Q. When was it that you first called to mind the fact that Chin Tai had been there, as you have said, that night? A. I do not understand.

Q. You do not understand. You have testified that you seen Chin Tai there after you finished your writing that night.

The COURT.—When did you first remember the fact, yesterday or immediately after, or this morning?

A. Oh, the other day when I was called up to Mr. Carden's office.

Q. Who else have you talked to besides Mr. Carden in the matter? A. Nothing, no one.

Q. Mr. Patterson?

A. Talked to Mr. Patterson.

Q. Have you talked to any Chinese, any of the Chinese people in this case at all? [509—429]

(Testimony of En You Kan.)

A. I have.

Q. Did you ever tell anybody that at the time you thought you saw Chin Tai there was between 12 and 1 o'clock? A. Never.

Q. Never told anybody that? A. No.

Q. After Chin Tai had gone away on this first trip did you stay in front of the police station for awhile?

Mr. PATTERSON.—Did he stay there for awhile?

Redirect Examination by Mr. PATTERSON.

A. I believe I stood there for awhile.

Q. Did you notice anything going on?

A. Why I heard a rumpus at Merchant and Fort Street, a number of cars there; I heard a noise, someone talking loud.

Q. How long was that after Chin Tai had been there?

A. Why, I could not tell just how long it was.

Q. To the best of your recollection?

A. Well, it was quite awhile after, just how many minutes I can't tell.

Q. Was it ten or fifteen minutes, five minutes, or what was it?

A. I could not just state, it was maybe 20, maybe 40 minutes.

Q. you can't say, you just remember the incident, but don't remember how many minutes it was?
[510—430]

A. No.

Q. Mr. Chin Tai came back the second time, and

(Testimony of En You Kan.)

when he came back the second time you remembered him as being there before that night?

A. Just once before.

Q. You are positive of that? A. Yes.

Q. When he went away the second time you got in the automobile? A. The second time?

Q. When he went away the first time he got in the automobile again? A. Yes.

Q. Did you notice anyone else in the automobile?

A. I didn't notice anyone else.

Recross-examination.

(By Mr. ULRICH.)

Q. You say between the time you saw Chin Tai and the time of this rumpus it may have been 20 or 30 or possibly 40 minutes, is that right?

A. Yes.

Q. You can't tell just exactly?

A. No, I can't tell exactly.

(Witness excused.) [511—431]

Testimony of S. Matsuda, for the Government (In Rebuttal).

S. MATSUDA, was called and duly sworn as a witness for the Government in rebuttal, and testified as follows: (Through the official Japanese Interpreter, H. Miki).

Direct Examination.

(By Mr. PATTERSON.)

Q. Your name is S. Matsuda? A. Yes.

Q. You were arrested the night before last for having opium in your automobile, were you not?

(Testimony of S. Matsuda.)

A. Yes.

Q. These men (indicating) were down there when you were arrested? A. Yes.

Q. Do you know these men? A. Yes.

Q. Do you know Mr. Wells? A. Yes.

Q. They are the two men who arrested you?

The COURT.—Does he know Mr. Wells?

A. I met him for the first time that night.

Q. Do you know Lee Choy? A. I do.

Q. How long have you known him?

A. About five months.

Q. Do you know a relative of his by the name of Lee Chuck?

A. I don't know his name, but I think he is his uncle.

Q. He is a fat Chinaman up there at Ah Chew Brothers, isn't he? [512—432]

A. Yes, that is the one, I know him.

Q. Lee Choy is employed by him? A. Yes.

Q. Now you remember the night of the 18th of October? A. I do.

Q. Now since that time have you seen Lee Choy and his employer? A. I did.

Q. And where did you see him?

A. The first time since I seen it was in the front of that store on Fort Street, there I saw him and Lee Choy.

Q. What did he say to you?

A. I was going to my stand from my home. He saw my car and he stopped me and he asked me how much it was for that ride the other night and he paid me the money.

(Testimony of S. Matsuda.)

Q. How much did he pay you?

A. Three dollars.

Q. Did he say anything else?

A. He said at the time when this case comes up for trial, "You might be asked to appear as a witness."

Q. Did he say anything else? A. That was all.

Q. Did you see him after that? A. I did, yes.

Q. Where? A. He sent for me from the store.

Q. Did you go over to his place? [513—433]

A. I did.

Q. And who was there?

A. Lee Chuck and Lee Choy.

Q. Was there anything said at that time?

A. Lee Choy then asked me if I would become a witness.

Q. What did you say? A. I said, "All right."

Q. What did he say?

A. He said to testify this way, then this man Lee Chuck made a suggestion to me that I went down to Kaneohe.

Mr. ULRICH.—I am going to object. Of course this witness may say anything. I object to anything that was said here between or by anyone not a party to this cause, not a witness in this case. This is something that Lee Chuck said after the thing is all over.

The COURT.—Was he present?

Q. Was Lee Choy present when this conversation was going on?

(Testimony of S. Matsuda.)

The COURT.—Was the defendant present at the time of that conversation you have just referred to? A. Yes, he was there.

Mr. ULRICH.—I do not understand that any conversation, anything said by anybody at all, in the presence of the defendant, is admissible for that reason. To let this witness go ahead and testify to facts which apparently are going to charge Lee Chuck with subordination—

The COURT.—Something said against me in my presence is always admissible. Objection overruled. [514—434]

Mr. ULRICH.—We take an exception.

A. I said, “All right.” Then to that Lee Choy said that Matsuda doesn’t know Kaneohe very well, it is not feasible. Then they both talked in Chinese; I could not understand. Then Lee Choy said, “I will meet you again and make arrangements accordingly.”

Q. Was that the end of this meeting?

A. Then Lee Chuck added this much—

The COURT.—The defendant was still present?

A. He was,—that all expenses will be paid, that I am to appear as a witness.

Q. What did he mean by saying that?

The INTERPRETER.—I am translating that.

Q. Whom does he mean, himself or Lee Chuck?

A. That refers to me.

Q. Did you see Lee Choy after that?

A. Yes, he called me to the store again.

Q. Who was present this time?

(Testimony of S. Matsuda.)

A. The both of them?

Q. What happened this time?

A. At that time Lee Choy requested me to testify to this effect, that I was sent for from the store at the corner of Hotel and Maunakea, that he, Lee Choy, got on the car there, and that I drove him along Hotel, down Richards Street, around the beach road, in front of pier 7, then up Fort and near the Bank of Hawaii, that I had met the car of Kamihara.

Q. What did you tell him? [515—435]

A. Then I said, "Why, I probably have to appear as a witness for Mr. Kamihara."

Q. What did he say?

A. Then Lee Chuck said that there would not be anything done against myself or against this fellow Kamihara, and requested me to appear as a witness.

Q. Then what happened?

A. Lee Choy, and of course Lee Chuck, both made a statement like that. Then Lee Choy said, "I will show you the store at the corner of Maunakea and Hotel, and the directions taken."

Q. What did you do then?

A. Then we drove down to the corner of Hotel and Maunakea and they got off, then they both went to this store. I was sitting in the car. Then he said to go to the attorney's office and make that statement to the attorney, then I went to the attorney's office with the defendant and there a fat Chinaman said to me that I must say that I was

(Testimony of S. Matsuda.)

sent for to this store, corner Maunakea and Hotel, that I drove the car along Hotel down Richard, along the beach road and up Fort.

Q. Then what?

A. I made that statement. And that he and Lee Choy got on the car of Kamihara at this place there on Fort Street.

Q. Did you go up to the attorney's office? [516—436] A. I did.

Q. Did you tell them this story that Lee Choy told you to tell them? A. I did.

Q. Were you telling the truth or were you telling that story false? A. That is false.

Q. Where is your stand?

A. River and Vineyard.

Q. And is Kamihara on that stand too?

A. Yes.

Q. How many other cars?

A. Three besides us two.

Q. That is 5 altogether? A. Five.

Q. Who owns that stand?

A. I don't know the owner of that stand, but I know the Chinese working in the store at the corner of Hotel and Nuuanu comes there to collect the rent.

Q. Does he collect rent from each of the drivers separately?

A. We all pay for the stand fifty-five dollars a month.

Q. Do you pay it in one lump sum?

A. We gather it together and pay it in one lump.

(Testimony of S. Matsuda.)

Q. Do you do this separately?

A. Separately, yes.

Q. And split on the expenses, is that correct?

[517—437]

A. Yes, we share and share equally the expenses.

Q. As far as the income is concerned, each man puts what he gets in his pocket? A. Yes.

Q. What is the number of your car? A. 4066.

Q. Did you see Lee Choy on the 18th of October, 1922? A. I did.

Q. Where did you first see him on that night?

A. At the corner of Nuuanu and School.

Q. How did you happen to go there?

A. A telephone message came.

Q. Do you know who from? In compliance with that telephone message where did you go?

A. I went to the corner of Nuuanu and School.

Q. Who did you see there, if anybody?

A. Lee Choy was standing in the road and waiting.

Q. Did he say anything?

A. He got on my car and said turn my car around.

Q. Do you know what time this was?

A. It was in the neighborhood of 11 o'clock.

Q. You are not positive as to the minute?

A. I am not.

Q. But it was around 11 o'clock?

A. Yes, about 11 o'clock.

Q. And when you got on the car what did you tell him to do? [518—438]

(Testimony of S. Matsuda.)

A. And he said, "I think Kamihara was arrested. I am looking for Kamihara."

Q. What else did he say?

A. Then he told me to drive straight down Nuuanu Street. Then when nearing Kukui Street he told me to drive into Kukui and drive west.

Q. And from there where did you go?

A. Then when the car got near the old Athletic Park he told me to drive into the lane there. When I got into the lane just a short distance he ordered me to stop.

Q. And what did you do?

A. He got off the car.

Q. Did you notice where he went to?

A. He got off my car, walked around and toward the back of my car and went into the small lane between two buildings.

Q. What did you do while he was in there?

A. I was sitting in the car waiting.

Q. How long? A. Probably five minutes.

Q. Did he come back? A. He did.

Q. Get on the car? A. Yes.

Q. Where did you go from there?

A. He said, "Turn the car around." [519—439]

Q. Where did you go?

A. Then I drove my car up to Kukui and along Kukui toward Liliha.

Q. Where did you go?

A. Then I drove my car along Liliha and when it got to School Street he said, "Turn into School toward ewa side."

(Testimony of S. Matsuda.)

Q. Where did you go?

A. Then after driving my car probably 200 feet away from the corner of Liliha and School he told me to stop my car, then he got off the car.

Q. Where did he go? A. He went into a house.

Q. On what street? A. On School Street.

Q. How long was he in there?

A. Probably ten minutes.

Q. Who came out then? A. He did.

Q. Where did you go from there?

A. Then he got on the car, the car turned around, and drove along School Street toward Nuuanu Street.

Q. Where did you go?

A. Then he told me, drive up Nuuanu, then he told me to go in Quong Tong Lane.

Q. Did you go in there? A. I did. [520—440]

Q. What did you do in there?

A. I went in there because he told me to go in there.

Q. Did he do anything in there?

A. He jumped off my car.

Q. Do you know where he went to?

A. I do.

Q. Where did he go?

A. At the time he jumped off the car there he told me to go in the back and turn my car and come here; I noticed him going on the verandah of a building.

Q. Did you turn around?

A. When I brought my car to this house, after

(Testimony of S. Matsuda.)

turning to the lane there, he was standing in front of this house.

Q. And what happened then?

A. Then he got on the car and said for me to drive down Nuuanu Street.

Q. Where did you go?

A. Then we went down as far as King Street and he said, "Go along King toward ewa side." Then when I got to the junction of Beretania and King he told me to stop, then he got off the car. Then after getting off the car he said to me, "I want you to go to the police station and see if Kamihara's car is there or not."

Q. What did you do?

A. I went to look for Kamihara's car, but as there was no Kamihara's car there so I returned to the same point. [521—441]

Q. From there where did you go?

A. Then he got on the car and he ordered my car to be turned, and he said he was going down to the police station, then we both drove down toward the police station to see if Kamihara's car was there or not.

Q. You went back again? A. Yes, I did.

Q. Did you stop down there?

A. I did not, we simply passed.

Q. Where did you go from there?

A. Then he asked me if I knew Kamihara's home. I said "Yes." Then he told me to go there. Then I drove the car to Kamihara's place.

Q. Was Kamihara there?

(Testimony of S. Matsuda.)

A. We went to Kamihara's garage, but as Kamihara's car was not in the garage we came back.

Q. Came back where?

A. Then we came as far as, back as far as River Street, then we turned up River Street mauka, then turned on Vineyard Street, toward Liliha, then up Liliha. Then we went to the former place and he told me to stop at that point.

Q. Which former place? A. On School Street.

Q. What do you mean by saying that was the former place? A. I told you I went there before.

Q. When you got there what did you do?

A. Lee Choy got off the car. [522—442]

Q. And where did you go?

A. He went into the house.

Q. And where did you go; what happened then?

A. I waited there.

Q. Did he come out again?

A. I must have waited there about 30 minutes or a little over 30 minutes, then Lee Choy and another fat Chinese they both came out of this house.

Q. Do you know this fat Chinaman's name?

A. I don't know his name, that is the first time I saw him.

Q. What did they do?

A. They both got on the car. Then I was ordered to go down to the police station.

Q. Did you go down there? A. I did.

Q. What happened?

A. We went down to the police station, and then

(Testimony of S. Matsuda.)

the fat Chinese, the one that got on the car at School Street, he got off my car.

(Recess.)

Q. When he got off your car what did he do?

A. Then this fellow got off the car and walked in the back way of the car, and I noticed the sergeant sitting in the back seat of the police station.

Q. What did he do?

A. He had a talk with this officer. [523—443]

Q. What did he do then?

A. Then he came back and got into the car, then Lee Choy said go down to pier 7.

Q. Do you know this fat sergeant?

A. I know him by sight.

Q. You do not know his name?

A. I don't know.

Q. Did you ever talk to him?

A. I have not.

Q. And then you went down to pier 7, you say?

A. I was told to go down to pier 7.

Q. Did anything happen down there?

A. Before we, when we got in front of pier 7, I noticed Kamihara's car, before we got there. Then Lee Choy said turn the car around.

Q. When you noticed Kamihara's car did you say anything?

A. Just when I noticed the car I said, "That is Kamihara's car."

Q. You said that, did you? A. I did.

Q. What did you do with respect to Kamihara's car? What did you do with respect to Kamihara's

(Testimony of S. Matsuda.)

car, did you stop or anything down there, go in front of it or behind it or where?

A. Kamihara's car was already in motion in front of pier 7. Then I called out, "That is Kamihara's car." [524—444] Then I was told to turn my car around and follow Kamihara's car.

Q. Did you do that? A. I did.

Q. Which way did you follow him?

A. That roadway in front of pier 7, right along that road, along Fort, then I went up Fort, then near the Bank of Hawaii my car caught up, I was in the same position as Kamihara's car, then someone called out, "Stop."

Q. Then what did you do?

A. Then Kamihara's car turned into Merchant Street and stopped, then I went and stopped my car in front of Kamihara's car.

Q. Then what happened?

A. Then the men came to where my car was, I don't know who he is, then the other Chinese who was in my car got off the car and Lee Choy was the only man that was sitting in my car. At that time a man came over with a searchlight and flashed the light; looked into my car, and noticed Lee Choy.

Q. Are you a married man?

A. I am married, yes.

Q. How old are you? A. Twenty-two.

Q. Have you any children? A. One.

Q. How old is it? [525—445]

A. Born on the 9th of this month.

(Testimony of S. Matsuda.)

Cross-examination.

(By Mr. ULRICH.)

Q. Matsuda, how long have you known Kami-hara? A. About three months, I think.

Q. You have been on the same auto stand with him for that time, have you?

A. He has been on the stand for three months. When I say I knew him three months, he has been on the stand for three months; I known him previous to this time.

Q. How long have you known him previous to this time? A. About a year.

Q. You speak English, don't you?

A. Some, yes.

Q. I would like to give the jury an opportunity to see how well this man speaks English. Answer me in English.

(Interpreter speaks to witness.)

Q. When was it that Lee Choy spoke to you after this night of October 18th about testifying? When was the first time?

(No response.)

The COURT.—The first time he spoke to you after the 18th?

A. (Speaking in English.) Asked me?

The COURT.—The first time Lee Choy spoke to you after the 18th, when was it and where was it?

A. I don't know the date. [526—446]

Q. Was it two or three days after the 18th, a week, a month, or how long after the 18th?

A. I think about after two weeks.

(Testimony of S. Matsuda.)

Q. About two weeks after? And where was it?

A. On Fort Street.

Q. Whereabouts on Fort Street?

A. Between School and Vineyard Street.

Q. You have been locked up, have you not, since the night before last? You have been under arrest since the night before last, been in jail?

A. (No response.)

The COURT.—You have been under arrest, locked up, since the night before last? A. Yes.

Q. You have gone over this matter very much at length, talked it over with Mr. Patterson here?

A. (No response.)

The COURT.—Have you talked with Mr. Patterson, the lawyer sitting there (indicating), have you talked to him about this?

A. Talked to him about what?

Q. About this case, about what you are going to testify here? A. Yes, I talked to him.

Q. You have told him what you are going to say here, is that right?

The COURT.—Did you tell him what you are going to say here in court? [527—447]

A. Yes.

Q. Has Mr. Patterson or anybody else said anything to you about what would or would not be done to you in connection with this opium deal, which you were arrested for, if you testified in this case? A. He did not.

Q. Nobody has told you that it was going to go easier with you if you gave this testimony?

(Testimony of S. Matsuda.)

A. (Through Interpreter.) He did not say that.

Q. Have you talked to Kamihara about this case?

A. You mean this case? A. Yes.

A. I did, Kamihara requested me to tell the truth.

Q. Kamihara didn't tell you where to say you went with this automobile that night, did he? Kamihara didn't instruct you what to say, where you went with this automobile? A. He did not.

Q. Kamihara didn't tell you about this house over by the Athletic Park, did he?

A. He did not.

Q. Kamihara didn't tell you about the house up on the lane off Nuuanu Street, did he, where you say you took Lee Choy that night?

A. He didn't say anything.

Q. Do you know Mrs. Alapa?

A. I don't know her.

Q. Have you seen a woman sitting here this morning? [528—448]

A. Yes, I have seen her. The first time I saw her was that night when the arrest took place.

Q. You do not know where she lived?

A. I did not.

Q. Never saw her driving around with Kamihara? A. I have not seen her.

Q. Kamihara never talked to you about her, told you anything about her?

A. He had not said anything to me.

Q. Now then about two weeks after the night that you say that you took Lee Choy on this ride

(Testimony of S. Matsuda.)

that you have been telling us about, you say that you met Lee Choy on Fort Street. You were in your automobile, I believe you said, and he stopped you and said he wanted to talk to you, is that right? A. He did, yes.

Q. Where did you say that you went on Fort Street? A. In front of the store.

Q. This woman that I have been talking about, you never saw her in your life until the night that you were stopped and the arrest was made on Fort and Merchant Street, is that right?

A. I have not seen her until that night of the 18th.

Q. You never knew anything about her? Never knew about her? A. I have not.

Q. Now just where on Fort Street was this again? [529—449]

A. About midway between School and Vineyard.

Q. At about what time of the day was it?

A. Early in the evening.

Q. Well, was it dark or light? A. It was dark.

Q. You were just driving along the street there, and Lee Choy called out from the sidewalk, is that right? A. He stopped me.

Q. Anybody in your car? A. No one.

Q. What kind of a car do you drive?

A. Studebaker.

Q. You pulled up alongside the curb there, did you?

A. On the other side of the store, on the opposite side of the store.

(Testimony of S. Matsuda.)

Q. What store? A. Lee Chuck's store.

Q. Ah Chew Brothers store, you mean?

A. Yes.

Q. Was anybody there who could have overheard what was said? A. I didn't see anybody.

Q. Just you and Lee Choy are the only people who know what was said there, is that right?

A. Yes.

Q. What did you say that Lee Choy said to you?

A. He asked me what was the fare of the other night's [530—450] ride.

Q. And you told him three dollars?

A. I said three dollars.

Q. And he paid you three dollars, did he?

A. Yes, he paid me, he gave me a five dollar bill and I gave him two dollars in change.

Q. He said that you might be wanted as a witness in this case, is that right?

A. Yes. He requested me to be a witness.

Q. He didn't say anything about the evidence or testimony, simply said he would like to have you as a witness?

A. He never said that at that time.

Q. Simply that he would want you for a witness, that is all?

A. He says that I may be asked to become a witness for him, then he says that if I would appear as a witness. That is all that was said on that occasion.

Q. That is all that was said at that time?

A. Yes.

(Testimony of S. Matsuda.)

Q. And then when was it that you next saw Lee Choy?

A. I could not say exactly how long it was after.

Q. As near as you can remember, two or three days or a week?

A. Probably a week or six days.

Q. That would be about three weeks then after the night of the 18th?

A. I could not say exactly. I could not remember the [531—451] dates

Q. What time of day was it you saw him the second time?

A. It was during the day-time, whether the forenoon or afternoon or the evening, I could not say.

Q. You have no idea whether it was morning or afternoon or early in the morning or late in the afternoon?

A. I have no recollection.

Q. Where did you see him?

A. He sent for me to the store.

Q. You mean he telephoned for you?

A. He did.

Q. Called you up at your stand?

A. When I was on the stand he called me.

Q. You went over to Ah Chew Brother's store?

A. I did.

Q. You went inside the store? A. I did.

Q. You left your car standing outside? A. Yes.

Q. A lot of clerks around in there, were there?

A. I think there was one or two, I could not say exactly.

Q. Do you know what day of the week it was?

(Testimony of S. Matsuda.)

A. I have no remembrance.

Q. Well, would you say that there were one or two clerks? [532—452]

A. I could not say exactly how many, one or two, but in the office there were Lee Chuck and Lee Choy waiting for me.

Q. Had you ever been in Ah Chew Brothers' store before? A. Yes, I have, many a times.

Q. How often had you been in the habit of going to Ah Chew Brothers store?

A. Oh, sometimes I was sent two or three times a week.

Q. Two or three times a week?

A. Whenever there is a steamer he generally sends for me.

Q. Who does?

A. When the store sends for me, the boss, Lee Chuck used to call me up.

Q. You have been in the habit of going inside the store on these occasions or waiting outside for him? A. I was sitting in the car waiting.

Q. Had you ever been inside the store there before? A. Yes, I have.

Q. How often had you been inside the store there? A. I could not say.

Q. Would you know a single one of those clerks, if we were to bring them up and show them to you?

A. I know that man sitting over there on the other side of Lee Choy.

Q. Was he there that day?

(Testimony of S. Matsuda.)

A. You mean the time I was sent for? [533—453]

Q. The time you were in there to see Lee Choy and Lee Chuck on the 18th?

A. I didn't see him.

Q. Well, do you know any other clerk in there?

A. I do.

Q. What other clerks do you know?

A. I know a fat Chinaman there.

Q. You would know him if you saw him, would you? A. Yes.

Q. There was a fat Chinaman there that day?

A. Yes. He was not there that time. I know another one.

Q. Who is he?

A. There is another one there, slim, tall fellow.

Q. Was the slim, tall fellow there that day?

A. I didn't notice him around there.

Q. Do you know any more?

Mr. PATTERSON.—Objected to upon the grounds it has been asked and answered; taking up too much time.

The COURT.—Objection overruled.

A. I don't know.

Q. You don't know any other? A. No.

Q. Of the one or two, or two or three Chinese you saw in there that day they are all Chinese that you don't know, is that right?

A. I don't know which one.

Q. Aside from Lee Choy and Lee Chuck you

(Testimony of S. Matsuda.)

could not [534—454] identify a single man who was in there that afternoon, could you?

A. I can't say.

Q. Was there any customers in there?

A. I didn't notice any.

Q. When you went in who did you first speak to?

A. Lee Chuck spoke to me first, said sit down.

Q. He was in the back in the office. Didn't you speak to anybody going through the store?

A. Lee Choy said, "Come in."

Q. Where did you see Lee Choy, was he back in the rear or up in the front?

A. He was in the office.

Q. That is in the rear part of the store, isn't it?

A. It is within the store premises.

Q. It is in the rear of the building, back of the rear of the building?

A. It was in the corner, back corner.

Q. You went in there, and went right through the store and when you came in Lee Choy called out to you, "Come out in here" or something like that?

A. While I was in the car there he called out to me, "Come in."

Q. He called out from the office to you while you were out in the car? A. He did.

Q. How far is it from the car to where he was in the office? [535—455]

A. From where I am sitting up to the doorway.

Q. How were you dressed, so that we can see whether anybody saw you around there or not?

(Testimony of S. Matsuda.)

A. I had on the same coat I have on now, but as to the trousers I don't remember what I had on.

The COURT.—Did you have on the same shirt?

A. I cannot say whether that is the same shirt I had on or not.

Q. And you have no idea of the time of day it was? A. I cannot.

Q. All right. You went in there and went into the inside office, the back, rear of the store there, where Lee Choy and Lee Chuck were sitting, is that right? A. I did.

Q. And you passed these clerks on your way in?

A. Yes.

Q. When you got in there who was the first one to say anything?

A. When I got in there I said, "Hello" and Lee Chuck spoke to me.

Q. What did he say? A. "Hello, how are you?"

Q. What else?

A. And he said "Sit down,"—offered me a chair.

Q. Go on.

A. I sat down. He said to me, "This boy here is working in this store for a long time, he got mixed up [536—456] in a case, probably you might be asked to appear as a witness." I said, "All right."

Q. Is that the occasion when Lee Chuck is supposed to have told you or asked you to testify that you had taken Lee Choy down to Kaneohe?

A. That was the day, yes, Lee Chuck said that

(Testimony of S. Matsuda.)

if I would make the statement that I went down to Kaneohe with Lee Choy.

Q. Did he ask you if you would make the statement, or ask you if you would swear under oath as a witness that you went down to Kaneohe?

A. Well, he made that statement, whether that statement was made to me or this other man I could not say.

Q. I am asking you what the statement was, did he say to you that he wanted you to say that you had gone to Kaneohe or that you had testified under oath that you had gone to Kaneohe in the case?

The COURT.—Tell us just as near as you can what the conversation was.

A. Lee Chuck said this: “How is it we make it so that Matsuda went down to Kaneohe?” then Lee Choy said, “No, Matsuda doesn’t know very much about Kaneohe.”

Q. Lee Chuck said how would it be if we said that Lee Choy went down to Kaneohe? A. Yes.

Q. Before any suggestion of perjury or anything of [537—457] that sort was made, was anything said to you about what was going to be done for you if you committed the crime of perjury yourself?

A. He said that if I would appear as a witness here all my expenses would be paid, if Lee Choy does not pay that he would pay it, and that there would not be any trouble for me.

Q. Pay your expenses, all your expenses, that is

(Testimony of S. Matsuda.)

the only inducement that was given you for committing the crime of perjury?

A. Well, he said that all the expenses such as hiring the car and other expenses that might be required in regard to this case.

Q. How long had you known Lee Chuck before he laid himself open to this?

A. Four or five months.

Q. What had been your relations by which he should have had such an extreme confidence in you. What kind of dealings did you have with him?

A. Well, there is nothing between us, except that he used my car.

Q. Have you ever had any business dealings with him of any kind? A. I have not.

Q. Just took you off the street as a rent driver and suggested perjury to you, did he? [538—458]

A. He did; yes, sir.

Q. Well, when Lee Choy or Lee Chuck suggested this story to you about going to Kaneohe what did you say to that?

A. I did not make any answer to that; afterwards this man here (indicating defendant) said to me, "Why we will make arrangements in the near future."

Q. Well, after Lee Choy had said that you didn't know very much about Kaneohe, then he said, "We will make arrangements in the future," is that all that was said?

A. There was no other conversation, but he requested.

(Testimony of S. Matsuda.)

Q. Requested you to what?

A. If I am called as a witness to assist him.

Q. No indication of how you were going to assist him, having decided that you were not going to have a trip to Kaneohe?

A. Nothing was said at that time.

Q. Lee Choy was the man who called you on the telephone?

A. I think it was him, but I am not positive.

Q. Lee Choy was the man who said that they could not use you for that Kaneohe story, then they did not talk about anything else, is that right?

A. There was no conversation except what I have stated here. Of course they had conversation among themselves in Chinese, which I could not understand.

Q. After you got through there you went away. Did [539—459] you see anybody at all you know who saw you go away?

A. I think there was one man.

Q. Who was that man?

A. I have no recollection of him.

Q. There was no one, no one you can remember to identify? A. No.

Q. After that conversation with Lee Choy when did you next see him?

A. Then I was sent again up to this store, he telephoned me.

Q. He telephoned to you a second time?

A. Yes.

Q. How long after the first time?

(Testimony of S. Matsuda.)

A. Three or four days.

Q. Have you any idea what time of day it was that time? A. I have no idea.

Q. You don't know whether it was early in the morning or late in the afternoon?

A. It was about midday, I think.

Q. When you were over there that time, aside from Lee Choy and Lee Chuck, did you see anybody that you knew?

A. Yes, there were some in there.

Q. How many were there besides Lee Choy and Lee Chuck?

A. I think there were two. [540—460]

Q. Do you know who either of them were?

A. I don't know.

Q. Where were Lee Choy and Lee Chuck that time? A. They were in the office.

Q. Who is the one who opened the conversation that time?

A. Lee Chuck opened the conversation.

Q. What did he say?

A. He said, "Sit down." Then Lee Chuck spoke to me, "I picked them up at the corner of Maunakea and Hotel and drove down Hotel, down Richard to pier 7 and up Fort."

Q. Lee Chuck said to you that you were to say that, that you were to testify you mean?

A. Lee Choy is the one that said that.

Q. Lee Choy said to you, "Matsuda, you testify in court that you got me at Maunakea and Hotel

(Testimony of S. Matsuda.)

and went up Hotel, down Maunakea'' and so forth, is that right? A. Not Alakea, but Richard.

Q. Lee Choy said to you that you were to testify that way, is that right? A. Yes.

Q. And did you agree to testify that way?

A. Well, I said Kamihara being on my stand, he is Japanese, being on the same stand, I don't think it is right for me to testify that way.

Q. You didn't say the reason why you don't think it [541—461] was right to testify that way because Kamihara was a Japanese on the same stand?

A. Yes.

Q. It didn't worry you particularly that that wasn't the truth, and that you would be committing perjury if you testified that way, is that right?

A. I didn't think of that.

Q. And when finally Lee Choy said to you that nothing would be done to Kamihara and nothing would be done to you, you agreed to perjury, to perjure yourself, is that right?

A. Of course Lee Choy said there would not be anything against me, or against Kamihara and wanted me to testify the way I have already stated.

Q. And you agreed to testify that way?

A. I said, "Yes, I would."

Q. You intended to really testify that way, didn't you?

A. I could not say one way or the other.

Q. And you had no greater inducement offered to you at that time than that your expenses were going to be paid, is that right?

(Testimony of S. Matsuda.)

A. That is what they said.

Q. At the present time you are under arrest, aren't you? A. Yes.

Q. You feel yourself pretty much in the power of the [542—462] prosecuting attorney here, don't you?

A. I don't think so I am in his power; but it is right for me to make a true statement.

Q. You know very well that he would be very glad to have you testify against Lee Choy?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I think the question is proper.

A. As to that I don't know.

Q. After having agreed to commit perjury for expense money he took you out to show you the place where you are supposed to have picked him up at, is that right?

A. Yes, that is the day he got on my car and took me over.

Q. Did Lee Chuck go with you?

A. He did not, only Lee Choy.

Q. Where was this place he took you to?

A. To the corner of Maunakea and Hotel.

Q. You had never been there before?

A. I may have been there before buying something.

Q. Do you know whether you had been to that store before, or not? A. I have not.

Q. You had never seen the fat Chinaman you told

(Testimony of S. Matsuda.)

us about before that night that you took him in your automobile? [543—463]

A. I have not.

Q. Well, after going down and showing this store and explaining the story you were supposed to tell, what did you do?

A. Took me down there, the car was stopped in front of this store and he got off the car.

Q. You mean he left you there?

A. He got on the car afterwards.

Q. He went in the store?

A. No, he did not go, he went and stood in front of the store.

Q. On that drive through the public streets of Honolulu that day, and while stopping in front of the store, while with Lee Choy that afternoon, did you see any single person you can remember who knows whether you were with him or not?

A. I didn't see anybody that I know of.

Q. And after you stood in front of the store what did he do—after he had stood in front of the store there, what happened then?

A. There was another man standing in front of the store, and they were both talking.

Q. He was talking to another man? A. Yes.

Q. Have you seen that man since that time?

A. I don't know who he is.

Q. Was he a fat man, the fat man that you talked about? A. He was not a fat man. [544—464]

Q. Well, after you talked to this man what happened? A. Then he got on to my car.

(Testimony of S. Matsuda.)

Q. And then what did you do?

A. He told me to go down to the attorney's office.

Q. And did you go to the attorney's office?

A. I did.

Q. The same day? A. Yes.

Q. Did you go with him; did you go together?

A. Yes, he came along with me.

Q. And what time of the day was it?

A. I could not remember.

Q. Who did you see at the attorney's office?

A. We went upstairs.

Q. Who did you see, what person?

A. There was one white man there I saw.

Q. Did you see him in the courtroom, is he in in the courtroom here now?

A. Yes, he is over there sitting down.

Q. Mr. Flint, the gentleman sitting at the end of the table? A. Yes, he is the man.

Q. Was there a stenographer there?

A. Yes, she was sent for.

Q. And he asked you questions and you answered them and she took them down in shorthand?

A. Yes, I noticed her writing.

Q. And in answering those questions that Mr. Flint put [545—465] to you that day you were lying, were you? A. Yes.

Q. Then you simply answered those questions and went away, is that right? A. Yes.

Q. You told him that night you went down Hotel

(Testimony of S. Matsuda.)

Street, down Richard Street, along the waterfront, and back up Fort Street? A. I did.

Q. All right. When did you next see Lee Choy?

A. After that Lee Choy and this Chinese sitting alongside of Lee Choy came to my stand.

Q. And what happened?

A. Then Lee Choy requested me to go to the attorney's office.

Q. That was how long after the first time?

A. I could not say how long after.

Q. Well, as near as you can remember?

A. Probably a week.

Q. And at that time I believe you saw me, didn't you? A. Yes, saw you.

Q. And I started to ask you questions?

A. Yes, you asked me questions.

Q. And you told me,—first you refused to talk in English, rather you seemed to be unable to talk in English, didn't you?

A. Well, I said that I could not speak very well, [546—466] that is what I said.

Q. And I got our Japanese interpreter to come in and interpret for you?

A. Yes, she acted as interpreter.

Q. And then when I started to ask you questions you commenced to give this other story—another story from the story you told Mr. Flint?

A. I made a statement which was true.

Q. You made a statement which was different from the statement you made to Mr. Flint, didn't you? A. Yes, different statement.

(Testimony of S. Matsuda.)

Q. And I only asked you two or three questions about what you did that night, didn't it?

A. Yes, you asked me two or three questions, and afterwards you made this remark, "Why is it that you are changing your statement now, your statement before are different," then you threatened me that if I told lies I will go to jail.

Q. I told you better be very careful about telling the truth or you would go to jail for perjury, if you told lies, that is what I told you? A. Yes.

Q. I told you you had made two statements in that office, one of which was bound to be a lie, didn't I? A. I didn't hear that.

Q. And I told you that—then I told you in substance [547—467] that it was impossible,—I told you you had come into our office one time telling us one story and come into the office another time and told us another story, and that you were bound to be lying, and we could not use you as a witness?

Mr. PATTERSON.—Objected to.

The COURT.—Objection overruled.

A. Well, I understand it this way, "Why is it that the first statement and the statement made to-day are different? What is the matter?"

Q. I asked you whether or not it was not a fact that Kamihara had been talking this thing over with you since you had been in our office the first time, is that so?

A. You didn't make such a statement.

Q. I didn't ask you whether you had been talking

(Testimony of S. Matsuda.)

to Kamihara, and whether Kamihara had been talking this thing in court with you since you had been to our office the first time?

A. I didn't hear you say that, but I heard Lee Choy speaking to you that probably I was bought by Kamihara.

Q. And in response to a question of mine as to whether you had been talking to Kamihara or Kamihara had been suggesting this story to you, didn't you say that you had been talking to Kamihara, that he was on your stand and that you had been talking to him right along about this? [548—468]

A. I think I said that I never talked to Kamihara.

Q. Well, was that true or was it false, when you said it?

A. I didn't have any talk with him; that is the truth.

Q. Before you came in the office and saw me that day you hadn't talked to Kamihara about this case, is that true?

A. We never said anything about the case in detail, except that Kamihara said that he was going to testify to the truth, and I said I will testify to the truth.

Q. The only conversation when the case came up, each of you made to the other, "We will testify about the truth"? A. Yes, that is about all.

Q. All through the negotiations that took place between you and Lee Choy and Lee Chuck relative

(Testimony of S. Matsuda.)

to procuring your perjured testimony, no greater inducement was made to you than to pay your expense money, is that right?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Q. Answer the question.

A. Yes, only the expenses.

Q. Now then on the night of October 18th,—

Mr. PATTERSON.—This man Susiki is here, the witness [549—469] counsel wanted to get, is here, and I would suggest counsel at this time put him on. I do not think we can finish with this witness to-day. I would suggest counsel finish up his case in order that he may be able to rest.

Mr. ULRICH.—I do not care to call him.

Mr. PATTERSON.—You rest, Mr. Ulrich?

Mr. ULRICH.—Yes.

The COURT.—Let the record show that the defendant rests.

Mr. ULRICH.—Q. (Resuming.) On the night of October 18th Lee Choy called you at your stand, did he?

A. Someone called me up; I don't know who it was.

Q. About what time did that someone call you up?

A. Just a few moments after or before eleven o'clock.

Q. Well, now, how do you know it was a few minutes before or a few minutes after?

A. I can say that from this, that I had taken

(Testimony of S. Matsuda.)

out a passenger and then returned to my stand, when I got back to my stand it was half-past ten. I looked at my watch there, it was sometime after that this telephone message came.

Q. Who was this passenger you took out?

A. I don't know who he was.

Q. A white man or Japanese or what?

A. Japanese.

Q. Where did you take him to? [550—470]

A. I remember taking a passenger out, as to where I could not say that.

Q. You don't know where you took him?

A. I have no recollection.

Q. How did you happen to notice the time particularly when you came back from the passenger?

A. Because I looked at the time.

Q. The only thing you remember about that whole trip with the passenger was the time you got back from the trip, you don't remember who the passenger was or what was done on the trip that night? A. I remember the time, yes.

Q. It was some time after half-past ten, you fixed it, a few minutes before 11 that this telephone call came to you?

A. I think it was a few minutes after or before eleven o'clock.

Q. Did you answer the telephone yourself?

A. I did.

Q. Did they ask for you by name or just for an automobile?

A. When I took the telephone the man on the

(Testimony of S. Matsuda.)

other side, or the person on the other side, said to have a car up to the corner of Nuuanu and School.

Q. And you went down?

A. Another chauffeur was there, a man by the name of Ogawa. [551—471]

Q. You mean he was on the stand when you left or was down there at the corner—

A. The telephone message came and I took the telephone, and so someone ordered the car to the corner of School and Nuuanu, and a man by the name of Ogawa was on the stand, it was his turn, and I spoke to him to go and he was putting his shoes on when a friend made an appearance and he told me to go.

Q. That Ogawa is a man who has been arrested too?

Mr. PATTERSON.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained. I don't think it has anything to do in the case.

(Exception.)

Q. And when you got down to School and Nuuanu Street you found Lee Choy standing there?

A. He was standing, yes.

Q. Anybody else around there that you knew?

A. I didn't see anyone.

Q. And he got into your automobile and told you to go where?

A. He said go down Nuuanu Street, he said, "Go down Nuuanu."

(Testimony of S. Matsuda.)

Q. Now then what time was it, as near as you can remember, when you left the corner of School and Nuuanu Street with Lee Choy?

A. It was around a little after 11, as soon as I can [552—472] after the telephone I drove up there.

Q. Would you say it was as late as 15 minutes after 11?

A. It would not take that long to get up there.

Q. And where did you go from Nuuanu Street?

A. He told me to go down Nuuanu. I drove down Nuuanu.

Q. Where to?

A. Then we got down near Kukui, and he says turn Kukui.

Q. Then tell me the various streets you turned on. Tell me where was the first place you stopped?

A. The first stop we made was in the lane at the Athletic Park.

Q. And you had never been there before?

A. I passed there many a time, but I have not stopped my car.

Q. Has anybody told you who lives in there?

A. Where?

Q. Where you stopped there, where Lee Choy lived? A. I didn't hear.

Q. How long did you stay there?

A. About five minutes.

Q. Then what did Lee Choy do?

A. He got off the car.

Q. Did he go inside any house?

(Testimony of S. Matsuda.)

A. I didn't see him go into the house.

Q. Did you see him go into the lane?

A. Yes, I saw him go into the lane. [553—473]

Q. And this would be some—about what time, when you got up there?

A. I could not say the exact time, but it was shortly after I took them on the car there at the corner of Nuuanu and School.

Q. Have you any idea how many minutes it takes you to go from where you picked him up to where you stopped there?

A. Well, going in an ordinary speed, probably four minutes or five minutes.

Q. Would you say it was 11:15 when you got there? A. I didn't look at the time.

Q. Judging from the time you left the automobile stand, I want you to fix the time when you got out there as near as you can?

The COURT.—Your best judgment.

A. Probably 7, probably between 5 and 7 minutes.

Q. Between 5 and 7 minutes after 11, is that what he said? A. I could not say.

Q. Well, that is your best judgment given us a moment ago, wasn't it? A. Yes.

Q. Has Kamihara taken you out to that place since that time? A. He did not.

Q. You haven't been out there, is that it? [554—474] A. I have not.

Q. After Lee Choy had been in there about 5 minutes, or three or four minutes, he came out again, did he? A. He did.

(Testimony of S. Matsuda.)

Q. And then where did you go?

A. Then he got on the car and told me to turn the car around, got into Kukui Street, along Liliha, into School.

Q. Then where was the next place you stopped?

A. On School Street.

Q. On School and Liliha?

A. Some distance away from the corner of School and Liliha, toward ewa.

Q. Now then, how long do you think it took you to get over there, from where you had been?

A. I could not say.

Q. It was only a matter of two or three minutes; not very far, is it?

A. Yes, I think you can make it in two or three minutes.

Q. So that if you arrived at this place at Athletic Park in five to seven minutes after 11, and he stayed in there three or four minutes, probably four minutes, you would have arrived over at this second place at about fifteen minutes after 11?

A. Yes, about that time, but I didn't look at the [555—475] watch.

Q. Well, what happened at this second place?

A. He got off the car and went to her house.

Q. Lee Choy went into her house? A. He did.

Q. How long did he stay?

A. Probably 10 or 15 minutes.

Q. You waited out in the car? A. Yes.

Q. Did you see anybody you knew?

A. I didn't see anyone.

(Testimony of S. Matsuda.)

Q. Or anyone that you know now, that you are able to identify? A. I didn't see anyone.

Q. Well, after he had been in there about ten or fifteen minutes he came out? A. Yes.

Q. Anybody come with him?

A. No, he came alone.

Q. And then where did you go?

A. I turned the car off, and drove along School, then up Nuuanu.

Q. You must have left there about eleven twenty-five or eleven thirty? A. I could not exactly say.

Q. Anyway he stayed in there about ten or fifteen minutes? [556—476] A. Yes.

Q. Now then, when you started out again where was the next place you stopped, that is the third stop you made?

A. The third stop was Quong Tong Lane.

Q. You drove in the lane and went back and turned around while he got out and went back on the porch, I believe you said?

A. Yes, I saw him going on the porch.

Q. You had never been in there before?

A. I had not.

Q. You don't know whether he lived in that house? A. I don't know.

Q. How long did he stay up on the porch; what did he do up there?

A. I don't know what he was doing.

Q. What did you see him do, did he just go up on the porch and stand there?

A. He told me to go into the lane and turn my

(Testimony of S. Matsuda.)

car around, and of course my car was moving slowly at the time.

Q. You didn't see where he went except he went up on the porch?

A. I simply noticed him going on to the veranda there.

Q. When you came back after turning your car around, did you see him? [557—477]

A. When I turned my car around and came back he was already waiting for me in front of this house.

Q. He got on and you went away?

A. And we went down Nuuanu Street.

Q. Kamihara had never taken you in that lane there? A. No.

Q. And never told you about anybody that lived in that lane? A. He did not.

Q. You just know it as Quong Tong lane but you have never been in it?

A. Oh, I know that lane there, Quong Tong lane there, I have taken some passengers to that lane there before.

Q. What passengers have you taken to that lane?

A. I don't know, I don't remember.

Q. How long before this had you taken any passengers in that lane?

A. Oh, sometime ago I think I took Chinese.

(Jury admonished.)

(Adjourned to 9 o'clock A. M. Monday, November 20, 1922.) [558—478]

(Testimony of S. Matsuda.)

In the District Court of the United States in and
for the Territory of Hawaii.

UNITED STATES OF AMERICA

vs.

LEE CHOY,

Defendant.

On Monday, November 20, 1922, at 9 o'clock
A. M., all parties to this action being present as
before, the following further proceedings were had
and testimony taken:

(Jury all present.)

S. MATSUDA, resumed the stand, and continued
his testimony as follows:

Cross-examination (Continued).

(By Mr. ULRICH.)

Q. Matsuda, after you had made the stop at
Quong Tong Lane, the third stop that you made,
in riding around that night, just tell us without
going into the road travelled or anything like that,
the other times that you stopped your machine be-
fore the arrest was made on Fort and Merchant
Street?

A. After leaving Quong Tong Lane I stopped at
the junction of King and Beretania at Kamihara's
place, then again at School near Liliha, then in
front of [559—479] the police station, then on
Merchant Street.

Q. And that was where the arrest took place?

(Testimony of S. Matsuda.)

A. Yes.

Q. Now, at none of these places did you stop more than a few minutes, no long stop anywhere?

A. The longest stop that I made was on School Street, we must have stayed there between 30 and 40 minutes. I did not notice Lee Choy coming up, because I was taking a little nap.

Q. That was the only long stop that you made?

A. The others were short, yes.

Q. Matsuda, the other night when you were arrested, that night, this opium was taken from your automobile, is that right? A. Yes.

Q. Isn't it a fact Matsuda that you and Ogawa, who was also arrested, and Kamihara, have been engaged in the joint enterprise for sometime, handling opium? A. No, sir.

Q. Do you not know that Kamihara has himself gotten opium off the steamboats before this, sometimes using other people to get it off, sometimes getting it off in other ways?

A. I have not seen him do that, not once.

Mr. PATTERSON.—I ask that the jury be instructed to disregard these questions of counsel.

Mr. ULRICH.—I am entitled to go into that.

The COURT.—I think I have already sufficiently instructed [560—480] the jury that the mere question of counsel is not evidence.

Q. And you still say you have never heard Kamihara speak about using these women for smuggling opium, or this woman, Mrs. Alapa?

A. I have not heard that.

(Testimony of S. Matsuda.)

Q. You have never even seen her driving in his automobile? A. I did not see her.

Redirect Examination.

(By Mr. PATTERSON.)

Q. Matsuda, how long ago was it when you first talked to me about this case?

A. I could not say exactly; it was a little over two weeks ago.

Q. Was it before you were arrested for having opium in your car? A. It was.

Q. Did you tell me the same story then as you have told on the witness-stand to-day?

A. Yes, the same.

Q. At that time you were not arrested or threatened with arrest, were you? A. I was not.

Q. Where is your automobile?

A. In the hands of the Government.

Q. Now, where is this automobile stand,—where is your [561—481] automobile stand?

A. On Vineyard Street.

Q. Vineyard and what? A. Near River.

Q. Do you know where Lee Choy lives?

A. I don't know where his residence is to-day, but at the time when he got on my car he was staying on Cunha Lane, cottage Number 4.

Q. What street does Cunha Lane open into?

A. On Vineyard Street.

Q. How far is that opening from your automobile stand? A. About 100 feet.

(Testimony of S. Matsuda.)

Q. Does Lee Choy go in and out of there almost every day, when he was living there?

A. I did not see him every day, but I have seen him go.

Recross-examination.

(By Mr. ULRICH.)

Q. At the time you first talked to Mr. Patterson, at the time you first told this story you have told on the witness-stand, you say you had not before that time talked to Kamihara about this matter, or gone over with him your testimony in this case?

A. I have not.

(Witness excused.) [562—482]

SURREBUTTAL.

Testimony of Lee Chuck, for Defendant (In Surrebuttal).

LEE CHUCK, called as a witness for the defendant in surrebuttal, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ULRICH.)

Q. What is your name?

A. My name is Lee Chuck.

Q. And you are one of the members of the firm of Ah Chew Brothers, are you not? A. Yes.

Q. And you have your place of business on Fort Street here in Honolulu? A. Yes.

Q. Grocery commission business? A. Yes.

Q. How many years have you been in business here in Hawaii?

(Testimony of Lee Chuck.)

A. About forty years, pretty near forty years I have been doing business; I think I have been doing business about 35, something like that.

Q. Do you know this Japanese here, Matsuda?

A. Yes.

Q. Have you ever used his automobile to drive around in? A. Sometimes.

Q. Mr. Lee Chuck, I am going to ask you whether or not at any time or at any place you have ever talked with [563—483] this man Matsuda about this case of Lee Choy's in any aspect at all?

A. I don't have anything to talk to that gentleman, not talked to anybody at all about Lee Choy's case, even you, his attorney. I never went down to visit with you or have any talk with you, with nobody.

Q. Have you been very careful to keep out of the case entirely.

A. I have kept out of the cases entirely.

Q. You have business with these boats here, have you not? A. Yes.

Q. Lee Choy was in your employ before his arrest, was he not? A. Yes.

Q. What did you do when he was arrested?

A. When they arrested I don't know they arrested,—I think arrested about Wednesday evening, and I think they got out on Saturday afternoon, Saturday afternoon, I think, between 2 and 3 P. M. Well, Murray and Mr. Taylor, as soon as Lee Choy—brought him down to my office. I see Lee Choy.

(Testimony of Lee Chuck.)

Mr. PATTERSON.—Objected to, as this is not in the nature of surrebuttal.

Mr. ULRICH.—I want to prove he has discharged Lee Choy and will not re-employ him.

Q. Isn't it a fact that when you learned of Lee Choy's having been arrested for opium that you discharged [564—484] him? A. Yes.

Q. And that you have given him to understand that he will not be re-employed unless he is cleared of this charge? Is that right?

A. As soon as I saw Lee Choy in an automobile in the store, coming back to the custom-house here, I say, "What doing Lee Choy on Saturday night, arrested do you?" and he says, "Yes."

Mr. PATTERSON.—Objected to as hearsay testimony.

Q. What did you give him to understand when you discharged him as to re-employment?

A. "Oh, well, how much I owe you?" I pay him off. "If you get out, or he plead guilty, if you been guilty—"

Mr. PATTERSON.—Objected to.

The COURT.—He discharged him. That will answer the purposes.

Mr. ULRICH.—If he is going to say if not guilty he would employ him back—

Q. Now, Lee Chuck, did you have any talk at all on Lee Choy's case,—did you have any conversation at all with this man Matsuda and Lee Choy together in the office in your store? A. No.

(Testimony of Lee Chuck.)

Q. And you never had any conversation about this place at any place or at any time? A. No.
[565—485]

Q. No.

Cross-examination.

(By Mr. PATTERSON.)

Q. Mr. Lee Chuck, have you got any interest in this case?

A. I got,—I couldn't have it because Mr. Ulrich on Friday afternoon I say I got nothing to do with the case entirely, have nothing to do with it at all. Mr. Ulrich said, "You have to go, you will have to go up there and tell them the truth," and I say, "Why I have nothing in the case at all."

The COURT.—Have you any interest in the result of this case? You have no interest in it have you? A. No.

Q. You do not care whether it is won or lost?

A. No.

Q. You do not care anything about it? A. No.

Q. You have no greater interest in it than a man who lives in Alaska, isn't that correct? A. No.

Q. You know Mr. Taylor, don't you?

A. Yes, I do.

Q. You get your license to go on and off these boats from the United States Government officials, don't you? A. Yes.

Q. In order to sell your produce on these boats you have to get a permit from them to go on and off, don't [566—486] you?

(Testimony of Lee Chuck.)

A. I don't understand that very well. You mean I know Mr. Taylor and get license from Mr. Taylor, or get permit from him?

Q. We will call it a permit. This is the permit to go on there and sell your produce, isn't that what it is for? A. Yes.

Q. They are pretty careful who they give those to? A. Yes.

Q. If they believe a man is after opium they are careful? A. I suppose.

Q. They don't give a man a permit to go on there and take opium off the boats?

A. That part I don't know, we never deal with anything like that.

Q. Do you know Chin Tai? A. Yes, I do.

Q. How long have you known him?

A. Chin Tai,—let us see, I think it is over ten years.

Q. You used to be in business with him?

A. Ten years ago.

Q. You and he were partners?

A. Ten years ago.

Q. Ten years ago you were partners? A. Yes.

[567—487]

Q. You know Lee Choy, don't you? A. Yes.

Q. How long have you known him?

A. I have known him ever since he was born.

Q. Do you know his father? A. Yes.

Q. What was his father's name?

A. His father was Ah Chew.

(Testimony of Lee Chuck.)

Q. Your brother? A. Yes.

Q. In other words, your brother is the father of this defendant, isn't he? A. Yes.

Q. That is true, isn't it? A. Yes.

Q. Lee Choy's brother is working down there in his place there now, isn't he? A. Yes.

Q. Driving the truck for you? A. Yes.

Q. Still you have no interest in this case, have you? A. I have got no interest in this case.

(Witness excused.)

Testimony of Lee Choy, in His Own Behalf (In Surrebuttal).

LEE CHOY, the defendant, recalled as a witness in surrebuttal, testified as follows: [568—488] (Through the official Chinese Interpreter.)

Direct Examination.

(By Mr. ULRICH.)

Q. Lee Choy, you heard Matsuda testify as to a certain conversation that was supposed to have taken place before you and— I will withdraw that. You have heard Matsuda testify as to a conversation or several conversations that is supposed to have taken place between yourself and him, some of which were in the presence of Lee Chuck, and in which Lee Chuck participated, in which you are supposed to have suggested things which he was supposed to have testified to. Did you ever have any conversation with Matsuda as to this case except to go and ask him to see your lawyers and tell them his story?

(Testimony of Lee Choy.)

A. I only told him to come down to see my lawyer.

Q. Before he came to see your lawyer did you talk to him at all as to what he was to testify to, or suggest anything at all what he was to testify to?

A. No, I did not suggest what to testify. I just told him to go down and see my lawyer, and tell the truth. One of my friends went down with him.

Q. You have heard the rest of his testimony, the story about travelling around down there with you that night, going various places, I will ask you whether that story is true or false?

A. It is not true.

(Witness excused.)

Mr. ULRICH.—Defendant rests.

Mr. PATTERSON.—The prosecution rests.
[569—489]

(Recess from 9:25 A. M. to 9:50 A. M.)

(Mr. Patterson makes opening argument for the prosecution.)

(Mr. Ulrich makes his argument on behalf of the defendant.)

(Recess from 11:25 to 11:32 A. M.)

(Mr. Patterson makes his closing argument.)

[570—490]

(Charge to the Jury.)

The COURT.—Gentlemen of the Jury: The indictment in this case is in two counts.

The first count charges that the defendant on

or about the 18th day of October, 1922, at and within the Territory and District of Hawaii, did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, twenty 5-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

The second count charges that the defendant on or about the 18th day of October, 1922, at and within the said district, did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute twenty 5-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt, derivative and preparation of [571—491] opium and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

In this connection, I instruct you, gentlemen of the jury, that the only offenses with which the defendant is charged in this case, and the only offenses of which it is legally possible for you to find him guilty, are the offenses charged and set forth in counts one and two of the indictment which I have just read to you. There is no charge made against the defendant in this case for in any way dealing with any other opium; as for example, the opium which the prosecuting witness, Mrs. Alapa, testified that she carried from the boat on her first trip on the night of October the 18th. And I further instruct you, gentlemen of the jury, in this connection, that the evidence concerning the first lot of opium which the prosecuting witness testified that she brought ashore from the steamer "President Wilson" was admitted in evidence solely as bearing upon the probability or improbability of the defendant having received, concealed, bought, sold or facilitated the [572—492] transportation, concealment, or sale, after importation, of the particular twenty 5-tael tins of opium received in evidence in this case, and also as bearing upon the probability or improbability of his having purchased, sold, dispensed, or distributed, those particular twenty 5-tael tins of opium without having had affixed to them the tax stamp required by law.

And, further in this connection, I instruct you that since May 26, 1922, it has been unlawful to fraudulently or knowingly receive, conceal, buy, sell or in any manner to facilitate the transporta-

tion, concealment, or sale, after unlawful importation of opium, knowing the same to have been imported contrary to law.

INSTRUCTION No. 2.

I instruct you, gentlemen of the jury, that the defendant in this case is not charged with having unlawfully imported or smuggled opium into the United States, but only with having unlawfully received, concealed, bought, sold and facilitated the transportation, concealment and sale of opium after it had already been unlawfully imported and brought into the United States, and, therefore, unless you find from the evidence that as a matter of fact this defendant did receive, or did conceal, or did buy, or did sell, or did facilitate the transportation, concealment or sale of this [573—493] particular opium after and not before it had been imported and brought into the United States, then you must find the defendant not guilty of the offense charged in count one of the indictment.

INSTRUCTION No. 3.

I further instruct you, gentlemen of the jury, that the defendant is charged in count two of the indictment of having actually purchased, sold and dispensed and distributed the particular twenty five-tael tins of opium in evidence in this case, and unless you can find from the evidence that, as a matter of fact, at the time of his arrest and of the finding of the indictment against him, he had actually purchased, sold, dispensed or distributed that particular opium which is in evidence in this case, then you must find the defendant not guilty

of the offense so charged in said count two of the indictment.

INSTRUCTION No. 4.

You are instructed that if you believe from the evidence beyond a reasonable doubt that the defendant on or about the 18th day of October, 1922, within the District and Territory of Hawaii, did fraudulently or knowingly receive, conceal, buy, sell or facilitate the transportation or concealment after importation of any quantity of smoking opium or opium prepared for smoking and which opium the defendant then and there knew to be smoking opium or opium prepared for [574—494] smoking, and then and there knew had been imported contrary to law, you should find the defendant guilty of count one.

INSTRUCTION No. 5.

You are instructed that if you find from the evidence beyond a reasonable doubt that the United States has proved that the defendant was in the actual possession of twenty five-tael tins of opium in the manner and form as charged in count two of the indictment and that there were no tax-paid stamps on the containers of said opium, that such facts taken by themselves shall be presumptive evidence of the violation of the act and on this evidence alone you are authorized to find the defendant guilty unless by some other evidence in the case or some other facts or circumstances in the case have raised in your minds a reasonable doubt as to whether or not the said possession by the defendant was lawful.

INSTRUCTION No. 6.

The word "possession" may mean either the conscious having, holding or detaining of property in one's power or control, and may refer to one's own property or to the property of another, and may be either permanent or temporary possession. The word "possession" is not limited to manual touch or personal custody. [575—495]

In this connection I charge you that if you find and believe from the evidence beyond a reasonable doubt that the defendant and Eunis G. Alapa were acting together and in concert in the acts as charged against the defendant in the indictment, then, irrespective of the individual acts, or either in the transaction, such individual acts would be the acts of each and both of them. The actual possession therefore of the said Eunis G. Alapa of the opium in question, if you so find that she had such actual possession, would be the possession of the defendant Lee Choy.

INSTRUCTION No. 7.

You are instructed that the statute under which this defendant is charged in count one of the indictment provides that when on trial for its violation, the defendant is shown to have, or to have had, possession of the said opium, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury. In this connection you are instructed that if the defendant has been shown to have been in possession of opium beyond a reasonable doubt, then it becomes

incumbent upon him, to show that his possession was lawful or innocent; in other words, the United States must show beyond a reasonable [576—496] doubt, possession by defendant and that the thing possessed was such opium and defendant had knowledge thereof; but when such possession by the defendant of such opium is so shown, then, as the terms of the statute provide, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain his possession to the satisfaction of the jury or, unless in the evidence somewhere, whether introduced by or in behalf of the Government, or in the circumstances appearing in the evidence, or in the nature of the possession itself, there is a satisfactory explanation or a satisfactory accounting for such possession—such an accounting or explanation made by the defendant or by the testimony in the case, as raises in your minds a reasonable doubt of the defendant's guilt.

INSTRUCTION No. 8.

It is incumbent upon the United States to establish the guilt of the defendant of the offense charged in the indictment, to the exclusion of every reasonable doubt in the mind of each of you before you can return a verdict of guilty. The minds of each and all of you must concur in your verdict, and if any one of you has a reasonable doubt of the defendant's guilt, you cannot convict. [577—497]

INSTRUCTION No. 9.

Gentlemen of the jury, you will observe from the reading of the indictment in this case, as

also from the reading of the first instruction which I have read to you, that the defendant is charged with the commission of various unlawful acts in relation to opium, which acts are separately and appropriately alleged, according to the nature of the charge, either in the first or in the second of the two counts of the indictment; and in this connection, the Court instructs you that before you can find the defendant guilty of either of the said counts it will be necessary for you to find and believe from the evidence that each and every single material element of at least one of the alleged unlawful acts charged in the count under consideration by you have been proven by the evidence beyond all reasonable doubt; and if you entertain a reasonable doubt as to the proof of any single material element of each and all of the alleged unlawful acts charged in the count under consideration by you, then you must find the defendant not guilty of that count. But if you do find and believe from the evidence that each and every single material element of at least one of the alleged unlawful acts charged in the count under consideration by you have been proven by the evidence beyond all reasonable doubt, then you should find the defendant guilty of that count. [578—498]

Having thus disposed of one count, you will then proceed in the same manner to consider the evidence as to the alleged unlawful acts charged in the other count and dispose of it according as the evidence may warrant.

INSTRUCTION No. 10.

Gentlemen of the jury, since there has been no testimony offered as to the previous character of the accused, you are instructed that a presumption of good character exists in his favor, and you are to consider this in determining your verdict.

INSTRUCTION No. 11.

You are instructed that counsel for the defendant has asked certain questions in this case in regard to the moral character of two of the witnesses for the prosecution. You are instructed that there has been no testimony admitted in this case to the effect that the witness Eunice G. Alapa was a prostitute and there has been no testimony admitted to the effect that Kamihara was a procurer for prostitutes and in this connection I specifically charge you that you are not in any way to take into consideration the question so asked by counsel to the effect that these two witnesses were such, or to infer anything therefrom derogatory to them.
[579—499]

INSTRUCTION No. 12.

I instruct you, gentlemen of the jury, that the witness, Mrs. Alapa, who has testified in this case, is a self-confessed accomplice in the commission of the crime as to which she has testified. You are instructed that an accomplice is not on that account incompetent as a witness. It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the Government has a right to use her as a witness. The testimony of an accomplice is, however, always to be

received with caution and weighed and scrutinized with great care by the jury; and you are not to convict upon such testimony alone, unless, after careful examination of such testimony, you are satisfied beyond a reasonable doubt of its truth. If you are so satisfied of the truth of such testimony and feel that you can safely rely upon it, even if not corroborated, it will then be your duty to convict.

INSTRUCTION No. 13.

You are instructed that you can find the defendant guilty of both counts; not guilty of both counts; or guilty of one count and not guilty of the other count as you believe from the evidence and the instructions of the Court that a verdict is warranted.

INSTRUCTION No. 14.

Gentlemen of the jury, I charge you that if [580—500] the testimony in this case in its weight and effect be such as two conclusions can be reasonably drawn from it, the one favoring the defendant's innocence, and the other tending to establish his guilt, law, justice and humanity alike demand that the jury shall adopt the former, and find the accused not guilty.

INSTRUCTION No. 15.

The Court further instructs you, gentlemen of the jury, that the defendant has interposed in this case the defense of what is known in law as an alibi; that is, as he claims, that he was at another place at the time of the commission of the alleged crime, and therefore was not, and could not have been, the person who committed the crime charged.

All the evidence should be carefully considered by you, and, if the evidence on this subject, considered and compared with all the other evidence in the case, is sufficient to raise in your minds a reasonable doubt as to the guilt of the defendant, you should acquit him.

The defendant is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of evidence. It is sufficient to justify an acquittal if the evidence upon that question raises in your minds a reasonable doubt of his presence [581—501] at the time and place of the commission of the crime charged, if you find that a crime was committed. And you will understand, also, that the attempt of the defendant to prove an alibi does not shift the burden of proof from the prosecution, but that the prosecution is bound to prove beyond a reasonable doubt that the defendant was present at the place of the alleged crime at the time of its commission.

INSTRUCTION No. 16.

The Court further instructs you, gentlemen of the jury, that you are the exclusive judges of the facts, of the weight of the evidence, and of the credibility of the witnesses, in this case. It is also within your exclusive province to determine from the conduct, the manner and the appearance of the different witnesses on the witness-stand, their manner of testifying, their apparent candor or frankness, or the lack thereof, which witness or witnesses are more worthy of credit and to give weight accordingly.

In determining the weight to be given the testimony of the different witnesses you should take into consideration their interest, if any, in the result of this case, their temper, feeling, prejudice or bias, if any has been shown, their means and opportunity of information, their apparent [582—502] intelligence or lack of intelligence, and the probability or improbability of the truth of their several statements, and any and all other facts and circumstances in evidence, which, in your judgment, would add to or detract from their credibility or the weight of their testimony.

If you find and believe from the evidence in this case that any witness has intentionally, corruptly, wilfully, and knowingly sworn falsely to any material fact or essential element, in this case, then you have the right to reject the entire testimony of such witness or witnesses in matters where their testimony is not corroborated by other credible evidence, or by the facts and circumstances appearing in evidence.

INSTRUCTION No. 17.

The Court further instructs you, gentlemen of the jury, that the indictment in this case is of itself a mere formal accusation or charge against the defendant, and is not of itself any evidence of the guilt of the defendant. The burden of proof in this case is upon the United States, and the law, independent of the evidence, presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves

him guilty to your satisfaction and beyond a reasonable doubt. [583—503]

The term “reasonable doubt” as used in these instructions, does not mean a mere possible, imaginary or conjectural doubt, but an actual, substantial doubt of the defendant’s guilt arising from the evidence, or from a lack of evidence, in the case.

A reasonable doubt is that state of the case, which, after a full and fair consideration of all the evidence, both for the United States and for the defendant, leaves your minds in that condition that you cannot say that you feel an abiding conviction, amounting to a moral certainty, that the defendant is guilty. If you have such reasonable doubt as to the defendant’s guilt, you must acquit him; for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the charge against the defendant is more likely to be true than the contrary; but the evidence must establish the truth of the charge to a reasonable and moral certainty—a certainty that convinces and directs your understanding and satisfies your reason and judgment—you being bound to act conscientiously upon such evidence. This we take to be proof beyond a reasonable doubt. If upon such proof you can say that you feel an abiding conviction, amounting to a moral certainty, that the defendant is guilty [584—504] as charged, then you are satisfied beyond a reasonable doubt, and you should convict him.

The bailiff will hand you a form of verdict. If you find him guilty you enter nothing in that blank;

if you find him not guilty you will write the word "no" in. That is to be signed by the foreman. I would suggest, as I had occasion to in the other case, that when you reach your jury-room you select from among your number a foreman, and proceed in a regular orderly manner and if any of the jury wishes to make any remarks that the others listen respectfully, and patiently. Remember that you should give each member close, patient, reasonable consideration and hearing. In that way you are going to reach a conclusion more readily and more satisfactorily, I think.

Mr. ULRICH.—We note an exception to the refusal of the Court and the giving by the Court, of prosecution's instructions Numbers 3, 5, 6, 7 and 17. These are as numbered by the Court, and the refusal to give defendant's requested instructions numbers 2, 5,—5 as numbered 2 of the other case,—6, 9, 8, 10 to 17 inclusive, 40 to 48.

The COURT.—So as to keep the record perfectly straight, the instructions given to the jury are each and all of them numbered by the Court, with a pencil at the top of the page. The instructions that the [585—505] Court refuses to give he places no number on them, merely writing the word "refused." The jury is not concerned with the instructions that are refused.

(Bailiffs sworn.)

(Jury taken to luncheon and upon return retire to jury-room.)

(Jury return verdict at 4:10 P. M.)

FOREMAN OF JURY.—Your Honor, in pre-

senting this verdict, the jury has requested me, if in order, to recommend leniency to the defendant.

(Verdict read by the Clerk.)

The COURT.—The verdict will be filed and made a part of the record in this case.

Mr. ULRICH.—We except to the verdict as contrary to the law and the evidence and the weight of the evidence and give notice of motion for a new trial.

The COURT.—The jury recommend leniency for the *Court* in their finding. You will be excused until 9 o'clock to-morrow morning.

Case closed.

I HEREBY CERTIFY the above and foregoing to be a full, true and correct transcript of my shorthand notes taken at the times and place aforesaid.

Honolulu, T. H., March 26, 1923.

R. N. LINN,
Official Reporter. [586—506]

In the United States District Court, for the Territory of Hawaii.

CRIMINAL—No. 3259.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
LEE CHOY,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court, for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 586, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the cause of United States of America, Plaintiff, vs. Lee Choy, Criminal Number 3259, as the same remains of record and on file in my office, and I further certify that I hereto annex the original transcript of testimony, two stipulations, three orders extending time and the original writ of error, original citation and U. S. Exhibit "C."

I further certify that the cost of the foregoing transcript of record is \$26.50/100, and that said amount has been paid by said plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 12th day of June, A. D. 1923.

WM. L. ROSA,

Clerk U. S. District Court, Territory of Hawaii.
[587]

[Endorsed]: No. 4052. United States Circuit Court of Appeals for the Ninth Circuit. Lee Choy, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record.

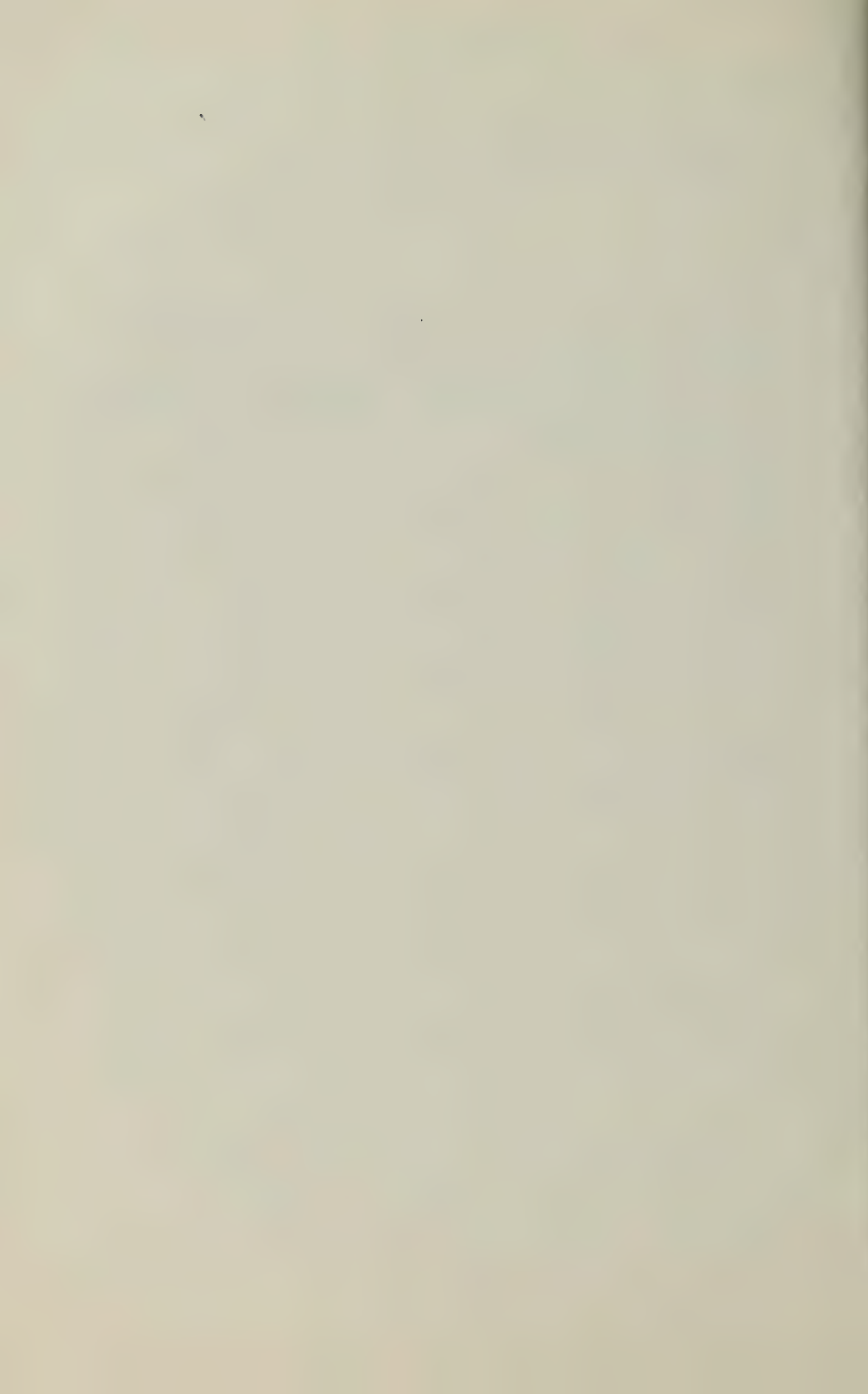
Upon Writ of Error to the United States District
Court of the Territory of Hawaii.

Received June 25, 1923.

F. D. MONCKTON,
Clerk.

Filed July 5, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit. By Paul P. O'Brien,
Deputy Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

LEE CHOY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

**BRIEF ON BEHALF OF PLAINTIFF IN
ERROR.**

Upon Writ of Error to the United States District Court
of the Territory of Hawaii.

THOMPSON, CATHCART & ULRICH,
F. E. THOMPSON,
Attorneys for Plaintiff in Error.

No. 4052.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

LEE CHOY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN
ERROR.

Statement of Facts.

On November 20, 1922, Lee Choy, the plaintiff in error, was indicted upon two counts for offenses against the opium laws of the United States. The first count (Record, p. 12) charged a violation of the Opium Law of 1909 as amended in 1914, referring to it by date, and was elaborated by a later instrument charging, over the signature of the United States Attorney, as follows (Record, p. 13):

Lee Choy "did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, twenty five-tael tins of opium, all of which said narcotic drug, as he, the said Lee Choy, then and there well knew, had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute," etc.

The second count (Record, p. 12) charged a violation of the Harrison Narcotic Act, referring to it by date, and was elaborated by a later instrument charging, over the signature of the United States Attorney (Record, p. 14), that Lee Choy did

"knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute twenty five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt, derivative and preparation of opium, and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package."

The defendant, having been arraigned and having pleaded not guilty, was brought to trial, and upon

the 20th day of November, 1922, was found guilty by the jury upon the first count of the indictment, and not guilty upon the second count (Record, p. 15).

The evidence for the prosecution in brief was that of a woman (Mrs. Alapa) who claimed to have been the accomplice and tool of Lee Choy, who testified that Lee Choy had directed her to go aboard the "President Wilson"; that she had done so and had there received a vest which she put on, with the assistance of Lee Choy, under her dress, filled with opium tins; that upon her second trip, wearing such a vest, she was arrested, taken to the police station and searched by the matron, where the vest and its contents were discovered. (Record, pp. 67-82.)

After the search at the police station, the woman took the officers to the spot where she said she had left the first load of opium, though nothing was found there. On the return to the station, their auto was hailed by another car and stopped. In the other car was Lee Choy, who, being identified by Mrs. Alapa, changed cars at the request of the officers and returned to the station with them (Record, p. 83).

This story is supplemented by the evidence of three narcotic officers who participated in the arrest, of Detective McDuffie, who was with them, and of the matron (Record, pp. 140-189).

The tins taken from the woman were twenty in number and of these, the Territorial Food Inspector selected two at random, and upon testing them, found them to contain smoking opium (Record, pp. 63-66). *There was no evidence whatsoever at*

any time during the trial of the size or measurement of the tins, or of the quantity of opium they held.

At the close of the evidence for the prosecution, the defendant moved for his discharge and an arrest of judgment upon the ground that the indictment was fatally defective as there was no charging clause, no finding clause, no recitation of the empanelment of the grand jury (Record, p. 228). These motions the Court denied. The defendant then offered his evidence.

The story of the prosecution was met by the absolute denial of the defendant and by evidence of an alibi to the effect that he was on the other side of the Island at the time with two other Chinese purchasing eggs in bulk for the store which employed him (Record, pp. 236, 237); that they returned to Honolulu about 11:30, and after having a little supper with one of the Chinese, Lee Choy and this Chinese started to drive home; that they met McDuffie's car, and when Lee Choy's companion said, "Hello, Mack," they were told to stop their car.

The verdict finding the defendant guilty upon the first count and not guilty upon the second, judgment and sentence were entered after a denial of a motion for a new trial. Immediately after such judgment and sentence, a writ of error was issued, upon which writ the cause is now in this Court.

Specifications of Error.

1. The indictment was void and required the discharge of the defendant.
2. The Court erred in refusing to instruct the

jury that each juryman must be convinced beyond a reasonable doubt before the defendant could be found guilty.

3. The verdict is inconsistent and repugnant, and therefore void.

Argument.

I.

The indictment was void and required the discharge of the defendant. (Specifications of error Nos. 3, 6, and 10.)

The purported indictment under which the defendant was charged was as follows (Record, pp. 11-14):

“In the United States District Court for the Territory of Hawaii.

October Term, 1922.

No. 3259.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEE CHOY,

Defendant.

“INDICTMENT.

COUNT I.

“Violation of the Act of February 9, 1909, as amended by the Act approved January 17, 1924, as amended by the Act of May 26, 1922.

COUNT II.

“Violation of Section I of the Act approved December 17, 1914, as amended by Section 1006 of the Revenue Act of 1918. Re-enacted by Section 1005 of the Revenue Act of 1921.

“A true bill.

(Sgd.) JAMES F. FENWICK,
Foreman.

WILLIAM T. CARDEN,
United States Attorney.

“I hereby order a Bench Warrant to issue forthwith on the within indictment for the arrest of the defendant therein named, bail hereby being fixed at \$——.

Judge, U. S. District Court, Territory of Hawaii.

“In the United States District Court in and for the
Territory of Hawaii.

October Term, 1922.

“The United States of America,

“District of Hawaii,—ss.

COUNT I.

“The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid of the Court aforesaid, on their oaths, present that Lee Choy on or about the 18th day of October, 1922, at and within the said District and within the jurisdiction of this Court, did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought

into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney.

“In the United States District Court in and for the
Territory of Hawaii.

October Term, 1922.

“The United States of America,
“District of Hawaii,—ss.

COUNT II.

“The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths, present that Lee Choy on or about the 18th day of October, 1922, at and within the said district and within the jurisdiction of this Court, did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt, derivative and preparation of opium and was so purchased, sold, dispensed and dis-

tributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney."

An indictment which charges an offense merely by reference to the statute and without setting forth any charge against the defendant save the name of a statute is insufficient and void.

See *The Schooner Hoppet vs. United States*, 7 Cranch 389, 3 L. Ed. 380; *United States vs. Boasberg*, 283 Fed. 305.

The instrument returned by the grand jury is headed "Indictment" (Record page 12). It is endorsed "a true bill," signed by the foreman of the grand jury and by the United States Attorney. Otherwise it contains none of the elements necessary to an indictment. There is no charging clause, no finding clause, no recitation as to the empanelment of the grand jury. There is nothing to show whether opium or coca leaves, or salt or derivative of either, was the subject of traffic. Yet the definite allegation that the narcotic is a derivative of either opium or coca leaves, was required in *United States vs. Hammers*, 241 Fed. 542. The charge merely indicates in two counts the violation of two anti-narcotic statutes, referring to the statutes merely by date of enactment.

Following this and attached to the same paper was what might have constituted a sufficient indictment in the absence of the first purported indictment. (Record, pp. 13, 14). The second portion is not entitled an indictment, but sets forth in two counts that "the Grand Jurors empaneled, etc., present that Lee Choy did, etc.," charging Lee Choy in the language of the statutes referred to in the preceding indictment, with "importation," etc. "of opium," and concluding "contrary to form of statute * * * and against the peace and dignity of the United States." This was signed by the United States Attorney.

An indictment signed by the United States Attorney without endorsement by the foreman of the grand jury as a true bill may be good in the absence of a more authentic charge, but only by recourse to the presumption that it is returned and presented by the authority of the grand jury. On the other hand such presumption cannot apply when it is rebutted by the record itself which in this instance already showed a charge in the cause signed by both the foreman of the grand jury and the United States Attorney.

In other words, the first instrument entitled "Indictment" and signed by the foreman of the grand jury and the United States Attorney is the record and the evidence in this cause of what the grand jury found. Having returned that indictment under the signatures of the foreman of the grand jury and the United States Attorney, how can the United States Attorney either elaborate such indictment or

substitute another one for it under his own signature alone?

While the purported charge of the United States Attorney might have been sufficient in the absence of the instrument called an "Indictment," by virtue of the inference that he was acting for the grand jury and for the foreman of the grand jury in signing and returning the instrument, that presumption cannot exist when there is present on the record an indictment signed by the foreman of the grand jury himself as well as by the United States Attorney, with the endorsement, "a true bill."

The second part of this alleged indictment then can constitute nothing more than a bill of particulars furnished by the United States Attorney in elaboration of the indictment filed in the cause and signed and returned by the grand jury through its foreman. But a bill of particulars, of course, cannot remedy an indictment that is fatally defective because it lacks a charge. (Collins vs. United States, 253 Fed. 609; Foster vs. United States, 253 Fed. 481.)

It is submitted that there was no authority for such an indictment as was presented in this cause. The indictment returned by the grand jury through its foreman and the prosecuting attorney is of no avail because it fails to charge the defendant with any crime. It merely refers to "a violation of the act," etc. Yet, being upon the records and files it was evidence to the Court that it was the indictment returned by the grand jury. The subsequent instrument signed by the United States Attorney alone

must therefore be presumed to be without authority and of no significance as charging the defendant with any offense. Therefore the Court should have directed a verdict of not guilty for the defendant, or have granted the motion in arrest of judgment, or the motion for a new trial, and any verdict of guilty returned under such a defective indictment is void and the judgment based thereon cannot be affirmed.

II.

The Court erred in refusing to instruct the jury that each jurymen must be convinced beyond a reasonable doubt before the defendant could be found guilty.

It is specified as error (covered by Assignments Nos. 12, 13 and 16) that the Trial Court refused to instruct the jury, in effect, that if any jurymen was not satisfied or should entertain a reasonable doubt of the guilt of the defendant, after consultation with his fellow-jurymen, that the jury could not then find the defendant guilty. Two instructions (Nos. 14 and 15) were offered covering this point, and they were as follows (Record, p. 58):

“Instruction No. 14.

“If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty. (Hughes, Sec. 301, pg. 299.)

“Instruction No. 15.

“Each juror must be satisfied beyond a reasonable doubt that the defendant is guilty as charged, before he can, under his oath, consent to a verdict of conviction. If any one of the jurors, after having duly considered all the evidence, and after having consulted with his fellow-jurymen, entertains such reasonable doubt, the jury cannot, in such case, find the defendant guilty. (Hughes, Sec. 301, pg. 299.)”

The plaintiff in error urges that since he was entitled to a verdict of not guilty in the event that any one or more of the jurymen had a reasonable doubt of his guilt, that then he was clearly entitled to an instruction to that effect and that a mere general instruction such as Instruction No. 17 (Record, p. 50) given by the Court upon reasonable doubt did not cover this phase of the case. The instruction given by the Court went only to the mass conclusion of the jury, the mere numerical weight of opinion, and failed entirely to cover the possibility of one or two or more of the individual jurymen feeling a reasonable doubt of the guilt of the defendant and of the conduct required of them in such case, even though the remainder of the jury should feel an overwhelming conviction of the defendant's guilt.

That the defendant is and was entitled to an instruction covering the duty of each individual jurymen in the event that such individual jurymen, after consultation with his fellows, should feel a

reasonable doubt of the guilt of the accused, is settled by the authority of numerous well reasoned cases. *Hale vs. State*, 122 Ala. 85, 26 So. 236; *Fletcher vs. State*, 132 Ala. 10, 31 So. 561; *Parker vs. State*, 132 Ind. 284, 35 N. E. 1105; *State vs. Ryno, Kans.*, 74 Pac. 1114. See also: *Shepherd vs. United States*, 236 Fed. 73, 79 (9th C. C. A.).

The plaintiff in error therefore respectfully submits that in the refusal of the Trial Court to instruct the jury that the doctrine of reasonable doubt was to be applied to the mind of each individual jurymen after consultation and discussion with his fellows, the accused was deprived of a substantial right; and the refusal of the Court to give the jury the instructions asked for upon this point was prejudicial error warranting reversal of the judgment and verdict.

III.

The verdict is inconsistent and repugnant, and therefore void.

The third specification of error is based upon the repugnance and inconsistency of the verdict of not guilty upon the second count and of guilty upon the first, and is covered by assignments Nos. 16, 17 and 18. The second count of the United States Attorney's charge is as follows (Tr., p. 14):

“that Lee Choy did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and

there was a compound, manufacture, salt, derivative and preparation of opium and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of statute in such case made and provided and against the peace and dignity of the United States.”

The first count of the charge is as follows:

“that Lee Choy did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.”

The evidence, as shown by the record, was concerned, upon both counts, with the same incident and the same drug. Therefore, it is a case of one transaction being the subject of two criminal charges.

But the jury found that Lee Choy did not purchase, sell, dispense, and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp, and yet, they did find that he received, concealed, bought, sold and facilitated the transportation, concealment and sale of 20 five-tael tins of opium after the same had been imported and brought into the United States, though he well knew they had been unlawfully imported and brought into the United States.

The result of the verdict of not guilty in the second count is one of two things, either one of which is equally fatal to the validity of the verdict of guilty on the first count: Under the finding under the second count, either the drug was unlawfully brought into the United States, or the defendant did not purchase, sell, dispense and distribute. If it was lawfully brought into the United States, then the verdict under the first count cannot stand, for it is essential to find the defendant guilty under that count that the narcotic should have been unlawfully imported into the United States. If, on the other hand, Lee Choy did not purchase, sell, dispense or distribute, then how could he have received, concealed, bought, sold, facilitated the transportation, concealment and sale of it?

Under the one count the jury has said that Lee Choy did not buy, sell, dispense and distribute opium. Under the other, it is said that he did buy, and sell it, and received, concealed and facilitated its transportation. And this verdict upon the two

counts, if the Court please, all concerned the one transaction.

The cases are unanimous that, where two counts of an indictment have reference to the same transaction and are inconsistent, the verdict cannot stand. Thus in *Kuck vs. State* (Ga.), 99 S. E. 622, the crime charged in the first count was that of selling spirituous liquors. The second count charged the having, controlling and possessing of spirituous liquors. The accused was held guilty on the first count and not guilty on the second. The Court said that there would be no inconsistency or repugnancy had the verdict been reversed to not guilty on the first count and guilty on the second, but there was inconsistency and repugnancy which required the verdict to be set aside as it stood, because if there were no having, controlling, or possessing, there could be no selling.

In *Baldini vs. United States*, 286 Fed. 133 (Ninth Circuit), the accused were charged with having liquor in their possession in the first count at Reno, and in the second count with maintaining a common nuisance by willfully and unlawfully keeping intoxicating liquor for sale at Tuscano Hotel in Reno. There were two defendants. One of them was held guilty under the first count and not guilty under the second, and the plaintiff in error was found not guilty on the first count and guilty under the second. The point being made that the verdict was repugnant and inconsistent, the Court said that if the two counts had related to the same transaction, the position taken by plaintiff in error

would be valid, and the verdict necessarily set aside. The Court approved its decision in *Rosenthal vs. United States*, 276 Fed. 714, but said that the distinction between that case and the case then under consideration was that the evidence in the latter showed that the counts referred to two entirely different transactions, and therefore there was no inconsistency and the verdict should stand.

In *Rosenthal vs. United States*, 276 Fed. 714, where the same transaction was involved in the two counts of the indictment, the verdict on the first count was to the effect that plaintiff in error neither bought nor received cigarettes which were stolen, and the verdict on the second count found that the plaintiff in error was at the same time and place in possession of the property with guilty knowledge that it was stolen. The Court held that the two findings were wholly inconsistent and conflicting, reversed the judgment and remanded it for a new trial.

It is submitted that these cases, two of them decisions rendered by this very Court, are conclusive in this case to the point that there was a necessary inconsistency in the verdict of guilty upon the first count of the indictment and not guilty upon the second count, and that the verdict of guilty against Lee Choy must therefore be set aside.

Respectfully submitted,

THOMPSON, CATHCART & ULRICH.

F. E. THOMPSON,

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE CHOY,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE DIS-
TRICT AND TERRITORY OF HAWAII

BRIEF FOR DEFENDANT IN ERROR

JOHN T. WILLIAMS,

United States Attorney,

T. J. SHERIDAN,

Assistant United States Attorney,

WILLIAM T. CARDEN,

United States Attorney, Hawaii,

Attorneys for Defendant in Error.



No. 4052

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE CHOY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE DIS-
TRICT AND TERRITORY OF HAWAII

BRIEF FOR DEFENDANT IN ERROR

I.

STATEMENT OF THE CASE.

This is a writ of error to the United States District Court of the District and territory of Hawaii, prosecuted by Lee Choy to reverse the judgment of conviction rendered against him by that court.

On October 21, 1922 (not November 20, 1922), the Grand Jury of the United States District Court of Hawaii, indicted the plaintiff in error on two counts for violations of laws respecting narcotic drugs.

The first count was based upon Section 2 of the Act known as "Narcotic Drugs Import and Export Act." The Act was originally passed and approved February 9, 1909, 35 Stat., 614. It was amended on January 17, 1914, 38 Stat., 275, and was further amended May 26, 1922, 42 Stat., 596.

The charging part of the first count is as follows: "The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths, present that

LEE CHOY

on or about the 18th day of October, 1922, at and within the said District and within the jurisdiction of this Court did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute in such

case made and provided and against the peace and dignity of the United States.

(Sgd) WILLIAM T. CARDEN,
United States Attorney.”
Record, p. 12.

The conviction of plaintiff in error rests alone on Count One; but owing to the points made by him, reference is also made to the second count of the indictment.

The second count was based upon the “Harrison Narcotic Act”, approved December 17, 1914, 38 Stat., 785, as amended by section 1006 of the Revenue Act of 1918, 40 Stat., 1130, and further re-enacted by Section 1005 of the Revenue Act of 1921, 42 Stat., 298.

The charging part of the second count is as follows:

“The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths, present that on or about the 18th day of October, 1922, at and within the said District and within the jurisdiction of this court, did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt,

derivative and preparation of opium and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney."
Record, p. 13.

The defendant was acquitted on the second count.

Thereupon the court on December 9, 1922, sentenced defendant to be imprisoned in Oahu prison at Honolulu for a term of two years and pay a fine of 250 and costs.

There is no bill of exceptions in the record. Apparently no such document was ever settled or allowed. There is furnished merely a transcript to which the reporter adds the certificate that it is a true transcript of his shorthand notes. Record, page 527. There is contained in the record what purports to be a copy of certain instructions proposed by the defendant and refused, but the statement is not contained in any bill of exceptions nor attested in any manner whatsoever. Record pages 52-61.

If we were to refer to the reporter's transcript it would appear that the facts lie in brief compass;

that the defendant procured a certain Mrs. Alapa to assist him in landing certain tins of smoking opium from a steamer docked at Honolulu en route from China; that thereupon the woman went aboard the steamer and going to a particular part of the ship removed her outer dress, thereupon the defendant assisted her in putting on a certain jacket containing certain pockets in which had been placed the tins of opium. The woman then went ashore and delivered the opium to the defendant. Record pages 67-75.

A subsequent trip of the same character was attempted and while going off the ship the woman was arrested and the opium seized. Record pages 77-79. The defendant submitted certain testimony in the form of an alibi which the jury evidently did not believe.

The only specifications of error now urged upon this Court in the brief filed on behalf of plaintiff in error are the following:

1. That the indictment was void and required the discharge of the defendant.

2. That the court erred in refusing to instruct the jury that each jurymen must be convinced beyond a reasonable doubt before the defendant could be found guilty.

3. That the verdict is inconsistent and repugnant and therefore void.

We confine our argument to the three points so presented.

II.

(A) THE INDICTMENT IS SUFFICIENT; IT IS NOT VOID; IT IS NOT EVEN IMPROPER IN FORM.

Count one of the indictment above set forth clearly states an offense against the laws of the United States under the "Narcotic Drugs and Import Act". It contains all the elements of the crime denounced by that statute. Tested by the rule that it should follow the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense, the indictment is amply sufficient. An application of the rule is seen in the case of

Young vs. United States, 212 Fed. 967, 968.

The plaintiff in error does not controvert but that if the charging portion of the count above quoted be considered, a public offense is there charged. Indeed, it is stated on page 9 of defendant's brief that the matters set forth on pages 13 and 14 of the record "Was what might have constituted a sufficient indictment in the absence of the first purported indictment". Thereupon the argument seems to be adduced that the matters appearing on pages 13

and 14 of the record are not part of the indictment, but that the only indictment or document to be considered as an indictment was what appears on pages 11 and 12 of the record.

Thus the sufficiency of the count as quoted by us above is in no respect challenged, the argument of defendant being based upon the premise that it is not a part of the indictment. We think that it clearly appears from an inspection of the printed record and especially from an examination of the manuscript record filed in the office of the Clerk that this premise is wholly without basis.

The record as sent up by the Clerk below is not neatly arranged. The proper arrangement would be to state each document according to its tenor and follow it by the various endorsements including the filing mark. In the arrangement of the record in the instant case, the Clerk has reversed this arrangement in the case not only of the indictment but of all other documents included in the transcript. The Clerk apparently has copied the endorsements usually found upon the back of the document, including the filing mark, names of parties, etc., immediately preceding the document in question. This is also true of the verdict (Record pages 14 and 15); of the order allowing writ of error (Record pages 30 and 31); of the writ of error itself (Record pages 32 and 33); of the citation on writ of error (Record pages 34 and 35); of the recognizance for costs (Record pages 36 and 37); of the recognizance for

bail (Record pages 40 and 41). The copy of the verdict for example is commenced by copying the filing mark (Record page 14). In printing the record, the printer has so arranged the filing endorsement of the verdict that it would appear to a casual reader that it would refer to the filing of the indictment (Record page 14). This apparently mislead counsel for plaintiff in error, but a close inspection as well as an inspection of the original manuscript record indicates that the filing mark in question refers to the verdict following. The figures "17" in brackets following the words "United States attorney" would indicate that the page of the manuscript there ended.

And so in the case of the indictment the Clerk of the Court below first set out the filing mark (Record page 11), and followed it by the matter appearing on the back of the indictment as endorsement, including the endorsement "A true bill by the foreman of the Grand Jury". After setting out this endorsement, he copies the indictment proper. This deficiency in the arrangement is manifest from an inspection of the record as above indicated. In truth the plaintiff in error is not without responsibility for this confused arrangement of the record. It is his duty to furnish to this court a proper copy of the record. If we should reason as he does that, owing to the fact that the endorsement portion of the indictment appears first that that alone could be considered as the document in question, and if

insufficient, that the insufficiency is fatal, we could by the same token show that a similar deficiency exists in the very writ of error upon which the jurisdiction of this court can be shown to rest, for there is a similar misarrangement of the endorsements and filing mark of the writ.

In the case of the indictment here, the whole document appears in the record and there is no ground for discarding any portion of it. It would thus appear at the worst that the matter usually constituting endorsements on the back of the endorsement, including the endorsement of "True Bill", had appeared upon the face or first page. But such an endorsement of the words "True bill" would not be defective for the reason that the indictment would be valid if it had in fact been returned even though it had never been so endorsed at all as was precisely held in the case of

Frisbie vs. U. S., 157 U. S. 160, 39 L. ed. 657.

In this case it is held that the lack of endorsement in question is not fatal to the indictment.

Moreover, as was further held in the case of *Frisbie vs. United States*, cited, the defect now urged is waived unless objection is made in the first instance; that at best the objection is merely as to form and is cured by the verdict under the provisions of Section 1025 R. S. Here if there was anything whatever in the point it should have been made at the threshold by motion to quash. No such motion was

made nor was any other objection made in the court below.

These considerations are further enforced from an inspection of the recitals of the judgment appearing at pages 17, 18, 19 and 20 of the record. It is seen that the judgment contains recitals of statements made by the court at the time the defendant was arraigned for judgment which showed conclusively that on October 21, 1922, the defendant was regularly indicted by the Grand Jury and that the first count of the indictment charged him with the crime for which we now contend he was tried and convicted. This sentence and judgment is a part of the strict record and may now be considered by this court.

We submit that it is clear that the only points urged against the indictment by counsel is based upon the premise wholly unfounded.

(B) THE PROPRIETY OR CORRECTNESS OF THE COURT'S ACTION IN GIVING OR REFUSING INSTRUCTIONS DOES NOT ARISE UPON THE RECORD; IF WE COULD CONSIDER DOCUMENTS PRINTED IN THE RECORD IT STILL APPEARS THAT THE ACTION OF THE COURT WAS ENTIRELY PROPER.

It is argued that the Court erred in refusing to instruct the jury that each individual jurymen must be convinced beyond a reasonable doubt before the

defendant could be found guilty, but in the absence of a bill of exceptions we insist that the point cannot be reviewed. The portion of the record referred to as containing two certain instructions proposed by the defendant and refused, being page 58 of the record, simply refers to a print in that portion of the record of what may have been certain instructions so proposed, but they are not included in any bill of exceptions or even in the transcript of the reporter's notes sent up. The document does not even appear to have been filed, nor does it show what other instructions the court may have given.

Under the uniform course of authority the matters so set forth cannot be considered since not embraced in a bill of exceptions. We need do no more than cite the late case of

Ukichi vs. U. S., 281 Fed. 525, 526.

This case heard on writ of error to the same court, was sent up without a bill of exceptions in view of which the court said the questions for review were of a limited character and would not consider any of the points urged that should have been presented on bill of exceptions. Other cases in support of the same doctrine are the following:

Frohwerk vs. U. S., 249 U. S. 204, 63 L. Ed. 561;

O'Connell vs. U. S., 253 U. S. 142, 64 L. Ed. 827;

Anderson vs. U. S., 269 Fed. 65.

In the instant case, however, if we refer to statements in the reporter's transcript it will appear that the court did in fact give and instruct on the subject in all respects proper. Record page 519. It there appears that the court charged the jury,

"It is incumbent upon the United States to establish the guilt of the defendant of the offense charged in the indictment, to the exclusion of every reasonable doubt in *the mind of each of you* before you can return a verdict of guilty. The minds of each and all of you must concur in your verdict, and if any one of you has a reasonable doubt of the defendant's guilt, you cannot convict."

It thus appears that even if the question properly arose in the record that the action of the court below was proper.

(C) THE VERDICT IS NOT CONTRADICTORY NOR IN ANY RESPECTS INVALID.

As we indicated above the first count was based upon the "Narcotic Drugs Import Act" as amended May 26, 1922, while the second count was based upon the Harrison Narcotic Act as amended in Section 1005 of the Revenue Act of 1921. The two acts denounce two separate independent crimes and in a given transaction a defendant may be shown to have violated both acts although in the particular transaction there may be an element common to both crimes. The latter act requires as a condition of criminality an element not found in the first act,

to wit, that the sale or distribution of the opium in question was from packages to which there was not affixed a tax-paid stamp, nor was it so distributed in original stamped packages. This element has no relevancy to the crime charged in the first count.

On the other, the crime charged in the first count requires that there be established the element that the opium had, to the knowledge of the defendant, been theretofore unlawfully imported and brought into the United States, which element would constitute no part of the showing necessary in regard to an alleged violation of the crime denounced in count two. It thus appears that the same evidence would not be required to secure conviction on each of the counts and that the doctrine of the case of

Morgan vs. Devine, 237 U. S., 632-639-640, is applicable.

A similar case in point is the case of *Gavieres vs. U. S.*, 220 U. S. 338, 55 L. Ed., 489. In the latter case the Court quoted with approval from the case of *Morey vs. Commonwealth*, 108 Mass. 433, as follows:

“A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”

It thus appears that the doctrine of such cases as *Rosenthal against United States*, cited in the brief

of counsel for defendant, is not applicable. In that case different counts of the indictment contain statements in different forms of violations of the same identical statute and referred, as was shown by a bill of exceptions in that case to the same transaction.

Here the counts are based on two entirely separate and distinct statutes, each containing an element not found in the other. *Non con stat.*, but that the jury was unable to find against the defendant as to the element peculiar to count two, and if it should appear to be true that such holding was illogical it may be pertinently said, as was said by Judge Dickinson of the United States District Court of the Eastern District of Pennsylvania, referring to a similar case: "Mere formal logical consistency is not one of the crown jewels of juries, and happily so." (272 Fed. 505).

In conclusion we urge that the matters brought forth by plaintiff in error as reasons for the ^{final} ~~refusal~~ of the judgment against him are wholly without merit and that the judgment should be affirmed.

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